

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

To be argued by
Victor C. Woerheide

**United States Court of Appeals
for the District of Columbia Circuit**

*For the
District of Columbia Circuit*

October Term, 1950 **FILED** OCT 23 1950

No. 10,489

HERBERT JOHN BURGMAN, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

**Appeal From the United States District Court for the
District of Columbia**

BRIEF FOR THE APPELLEE AND JOINT APPENDIX

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STATEMENT OF QUESTIONS PRESENTED

- I. Is a treason indictment sufficient under the First Amendment of the Constitution if the overt acts set forth therein are based upon the defendant's actions in speaking into a microphone and thus making recordings of radio programs for the use of an enemy radio broadcasting station?
- II. Do the laws pertaining to treason have extra-territorial application so that a treason indictment is sufficient which charges that defendant, while domiciled in enemy territory, outside the jurisdiction of the United States, in time of war adhered to certain enemies of the United States, giving them aid and comfort?
- III. Where defendant is charged with the offense of treason for having recorded radio broadcasts for transmission by a radio station controlled by an enemy government, does the admission in evidence of the original recordings of such broadcasts violate the constitutional rule against compulsory self-incrimination?
- IV. Where the trial court denies a defense motion to subpoena alien witnesses residing abroad, and enters an order permitting defendant to take the depositions of such witnesses, and pursuant to this order these depositions are taken and received in evidence, has defendant been denied his constitutional right of compulsory process?
- V. In a treason prosecution, is the defendant denied his constitutional right to a trial by an impartial jury if the trial court refuses to exclude employees of the United States government from the jury panel?
- VI. Where defendant is permitted by the trial court to explain his failure to produce a document which he allegedly received and state its contents, and defendant bases a request for an instruction to the jury on his testimony concerning the substance of the

document, can it be said that the trial court refused to admit evidence of the contents of the document?

- VII. Where the defendant raised the issue of his alleged insanity at the time the offense was committed, and the trial court repeatedly informed the jury that they were the sole judges of the facts, that their recollections of the facts must prevail, and that the comments of the court upon the evidence were not binding upon them, was it an abuse of discretion for the court to observe that there was no testimony on the part of certain witnesses who had been in regular association with defendant during the period when the offense was committed as to irrational conduct by the defendant and it would be reasonable to infer that to them the defendant appeared to be rational?
- VIII. Where two expert witnesses had already been called by defendant to testify on the issue of defendant's sanity, and one had been called by the prosecution, and the trial judge had extensively intervened in the questioning of these expert witnesses to bring out the facts of the case, was it an abuse of discretion for the trial judge to intervene similarly in the interrogation of a third expert witness called by defendant?
- IX. Where the defendant was permitted to subpoena two expert witnesses at the government's expense to testify on the issue of his alleged insanity, and the prosecution had called one expert witness to testify on this issue, was there an abuse of discretion when the trial court declined to permit the defendant to have a third expert witness at government expense for the reason that the testimony already received was sufficient and also funds were not available to defray the costs, but later granted the defendant permission to call his third expert witness at his own expense, as subsequently requested by defendant, and then granted the prosecution permission to call a second expert witness for the government, no additional witnesses being requested by either party?
- X. In a treason prosecution, where there was no evidence to indicate that the defendant, a native born

United States citizen, had been expatriated, but defendant testified that he believed that he had been expatriated, and the court instructed the jury that the government must establish an intent on the part of the defendant to betray his country and permitted his counsel to argue to the jury that defendant lacked such an intent since he believed that he was expatriated as a United States citizen, was it error for the trial judge to decline to instruct the jury specifically that they could not convict defendant if they were satisfied from all the evidence that he "was under the honest belief that he no longer owed allegiance to the United States"?

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**United States Court of Appeals
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October Term, 1950

No. 10,489

HERBERT JOHN BURGMAN (Joe Scanlon), *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

**Appeal From the United States District Court for the
District of Columbia**

BRIEF FOR THE APPELLEE

This is an appeal from the judgment of the District Court of the United States for the District of Columbia, entered on December 20, 1949 (App. 64), sentencing the appellant to be imprisoned for not less than six nor more than twenty years, upon his conviction by verdict of a jury (Tr. 2059, 2060), on an indictment for treason (App. 1) in violation of the Act of March 4, 1909, c. 321, § 1, 35 Stat. 1088, United States Code (1940 Ed.), Title 18, § 1.

JURISDICTION

The judgment appealed from (App. 64) was entered on December 20, 1949, and the notice of appeal (App. 65) was filed on December 20, 1949. The jurisdiction of this Court rests on Section 1291 of the Judicial Code (U. S. C.,

Title 28, § 1291). See also Rule 37(a), Federal Rules of Criminal Procedure.

COUNTER-STATEMENT OF THE CASE

Appellant was indicted for treason in the United States District Court for the District of Columbia (App. 1). The indictment alleges that from December 11, 1941, to May 8, 1945, appellant, a native-born citizen of the United States and a person owing allegiance to the United States, unlawfully and treasonably adhered to enemies of the United States, to-wit, the Government of the German Reich, with which the United States was at war, the German Radio Broadcasting Company and the officials and employees thereof, giving to these enemies of the United States aid and comfort. It was alleged that appellant's adherence to the enemies of the United States and his giving them aid and comfort consisted of working as a radio speaker and commentator and as manager of a broadcasting station for the Overseas Service of the German Radio Broadcasting Company, which was controlled by the German government, and that this work included the preparation and composition of commentaries, speeches, talks, discussions, dialogues, and fictitious news reports, and the recording thereof, for subsequent broadcast by radio from Germany to the United States in such a manner as to simulate radio programs and transmissions broadcast by a radio transmitting station situated in the United States. It was further alleged that these activities of the appellant were intended to assist the German government in its war effort, to persuade citizens and residents of the United States to decline to support the United States in the conduct of the war, to weaken and destroy confidence in the administration of the Government of the United States, and to impair the morale of the members of the United States engaged in the prosecution of the war.

The indictment alleged 69 overt acts, all of which involved incidents of the appellant's broadcasting activities, and all of which were alleged to have been committed with treasonable intent and for the purpose and with the intent

to adhere to and give aid and comfort to the enemies of the United States.

Prior to trial the Court directed that the Commission on Mental Health for the District of Columbia examine the appellant, and conduct an investigation to determine his mental condition (App. 30). The Commission reported to the Court that appellant was mentally fit to stand trial (App. 41), and accordingly he was tried before a jury.

Of the 69 overt acts alleged in the indictment, 56 were withdrawn by the Government at the behest of the trial court to simplify the proof and 13 were submitted to the jury. Appellant was found guilty by the jury (Tr. 2043; App. 54) which, in special findings found that appellant had committed each of the overt acts submitted to it as "a treasonable act with intent to betray the United States" (App. 52). The Court thereupon sentenced appellant to imprisonment for a term of not less than six and not more than twenty years (Tr. 2059, 2060; App. 64).

A. Appellant's Activities Prior to December 11, 1941

Appellant was born at Hokah, Minnesota on April 17, 1896 (Tr. 349-353, 1360 to 1363). He was educated in the public schools of Minnesota for ten years and attended high school in LaCrosse, Wisconsin. He came to Washington, D. C. in the year 1917 where he was employed by the War Department as a clerk, working at night, and completing his high school studies during the day. In March or April, 1918, appellant entered military service and was assigned to duty as an Army field clerk. He served overseas in France and Germany and received an honorable discharge at Coblenz, Germany, in August, 1920. Just before his discharge appellant married his present wife, who was then a German citizen and who acquired American nationality through her marriage (Tr. 1183, 1184, 1216, 1217). After his discharge appellant proceeded to Berlin, Germany, where he was employed as a clerk by the United States Military Observer, later the United States Military Attache. Appellant continued in this employment from August 7, 1920, until the outbreak of war between Germany

and the United States in December, 1941 (Tr. 1360-1363), rising to the position of chief clerk (Tr. 122, 1366, 1367). For a time appellant attended the University of Berlin outside of his office hours, and in 1931 he received his Doctor's degree from the Political Science Faculty of the University. (Tr. 262-265). As chief clerk in the Military Attache's office prior to Pearl Harbor, appellant handled all of the normal administrative functions of the office. He was the finance clerk, and had charge of all the files except for certain classified files. In addition, he also wrote economic reports (Tr. 122, 123).

B. Appellant's War-Time Activities and Treasonous Intent

Appellant last appeared at the Military Attache's office on December 12, 1941, after the outbreak of hostilities between the United States and Germany (Tr. 122, 131). He was ordered to turn in his passport, and did so (Tr. 124, 125, 133, 134, 1229, 1371, 1372). On December 13 he sent word to the office that he was ill and did not appear at the office (Tr. 124, 125, 1193, 1194). On December 14 his Chief, Colonel Lovell, spoke to appellant by telephone at his home, ordering him to report for internment with the Diplomatic staff (Tr. 126, 136, 137). Appellant stated he was unable to do so, since he was ill. He complained of a heart attack (Tr. 137, 1230, 1231, 1377-1380).

Within a week after the outbreak of war between the United States and Germany, appellant, accompanied by his wife, met a friend, a Doctor Schoenicke, in a department store in Berlin. Appellant and his wife were both very excited about the outbreak of war. Doctor Schoenicke asked appellant whether he would return to the United States at this time. Appellant replied, in substance, that he could not return, without explaining the reason, and stated that he was greatly worried as to how to defray his living expenses from then on. Appellant did not say anything to Doctor Schoenicke on this occasion about having suffered a recent heart attack (Tr. 1355-1359).

About February or March, 1942, on a Sunday morning, appellant met a neighbor, Herman Stoesser, on the street

before his home. Stoesser, a former German civilian employee of the American Embassy in Berlin (Tr. 151), who knew appellant from this employment, inquired of appellant why he had not joined his colleagues at the internment camp. Appellant replied in substance: "What do I have to do with them, or with the affair of being interned? America is going to lose this war hands down" (Tr. 153, 175).

The witness, Gerdt A. Wagner, testified that as of January, 1942, he was head of the news room of the United States Zone of Radio Berlin (Tr. 180, 268, 269), a German government corporation (Tr. 181). The director of Radio Berlin, a Dr. Winkelkemper, received daily directives and instructions from the German Propaganda Minister, Dr. Goebbels. Dr. Winkelkemper thereupon passed on these directives and instructions to his subordinates, including Wagner, and the head of the United States Zone, Schotte, advising them of the news to be stressed in broadcasts to different countries and the propaganda line to be followed (Tr. 183). Schotte and Wagner then relayed these directives and instructions to the individual commentators who wrote the broadcasts (Tr. 181, 182).

In January, 1942, Schotte gave Wagner two typewritten manuscripts bearing appellant's name and address and requested Wagner to read them (Tr. 186). These manuscripts discussed current economic questions (Tr. 187). Wagner was favorably impressed by them, and accordingly recommended to Schotte that "they get in touch with Dr. Burgman and get acquainted with him" (Tr. 188). Early in February, 1942, appellant, at Wagner's invitation, came to see Wagner at his office in the Radio Building. Wagner informed appellant that he had read appellant's manuscripts, that he liked them very much, and that Radio Berlin was looking for co-workers who had appellant's gift of writing clearly on economic subjects. Wagner told appellant that Radio Berlin was planning to establish a new clandestine radio station which would operate as though it were located in the Middle West of the United States. He told appellant that "we would like to have him work with

us on that station." Appellant replied that he was willing to do so (Tr. 188-190). There was some discussion as to whether appellant's name would be used in these broadcasts. Wagner assured appellant that his name would not become known in the United States and appellant was pleased at this (Tr. 200).

The next day appellant came again to Wagner's office and Wagner then introduced him to Schotte, the head of the United States Zone of the German Radio. At this time, "Mr. Schotte asked Burgman if he would be interested to work at Radio Berlin, for this particular station, and Mr. Burgman expressed his willingness again" (Tr. 191).

Appellant and Wagner thereafter had frequent meetings preparing to get the projected secret station on the air (Tr. 192). On one occasion they conferred with one Cleinow, the head of the German shortwave system, in the latter's office. Weltin, the head of the technical division of Radio Berlin, was called in. Cleinow, in urging that the necessary technical arrangements for the new station be expedited, stated that Dr. Goebbels, the German Propaganda Minister, had given orders to get the new station started as soon as possible (Tr. 192, 193).

In organizing the new station, appellant and Wagner discussed the name it would use, agreeing on the name of "Station Debunk." They discussed the type of propaganda to use on the new station. They discussed the necessity of concealing the true source of its broadcasts by avoiding the regular German propaganda line, and possibly even using some anti-Nazi propaganda. It was understood that their main endeavor would be to disrupt the allies and create dissention within the United States (Tr. 195-199, 305, 306).

Appellant and Wagner decided that appellant would be the principal speaker of this station and would use the name of "Joe Scanlon." After discussing various tunes which could be used to identify the station, appellant and Wagner decided to use the Star Spangled Banner. They also decided to announce the broadcasts according to Central

Standard Time. The broadcasts were to be made daily (Tr. 199-201).

In order that appellant would have the necessary data and information for preparing his manuscripts for the broadcasts, Wagner made available to appellant material in the United States Zone news room, including the German monitoring reports of allied broadcasts, foreign magazines, newspapers and books obtained from abroad by the German Foreign Office, and certain classified material from the Propaganda Ministry and the Foreign Office. Wagner also introduced appellant to officials of the Foreign Office and the Propaganda Ministry and asked them to assist appellant in his work by furnishing appellant with material which he could use in preparing his broadcasts (Tr. 201 to 204).

Appellant's preliminary employment with the Radio began about March 5, 1942. He began his broadcasts to the United States about March 12, 1942 (Tr. 211). Appellant was employed under a special contract (App.) which was approved by the German Propaganda Ministry and which provided for a salary of 1500 marks per month. Pending approval of the contract, which was signed on June 19, 1942, appellant was paid on a day-to-day basis. At the time, appellant's contractual salary established a precedent, in that it constituted a new maximum for the Radio personnel. Accordingly, there was some delay in clearing it through the various governmental offices concerned. When appellant's contract went into effect, Schotte, as head of the United States Zone, was receiving only 600 marks a month, and Wagner a salary of 900 marks a month (Tr. 206-211).

When Station Debunk first went on the air appellant and Wagner shared the work of preparing its manuscripts, each writing about half of the total number of broadcasts. Later Wagner stopped writing broadcasts and appellant wrote the greater proportion of the total number (Tr. 212).

Wagner, and later Wagner's deputy and successor, Fritsch, supervised appellant's preparation of manuscripts by reading them over to be certain that they conformed with the general policy prescribed for that particular sta-

tion and did not contain information which it was forbidden to broadcast (Tr. 212, 213, 271, 1076, 1077, 1079).

In July of 1942, upon returning from a vacation, Wagner discovered that in his absence fictitious news flashes and a "columnist style" of gossipy broadcast, patterned after Walter Winchell, had been introduced into the Station De-bunk broadcasts by appellant and one Dr. Volz, who was briefly associated with Radio Berlin. Wagner objected to this type of broadcast on the grounds that it could not be carried out intelligently so that it would be convincing. However, Wagner was overruled because appellant thought the innovations to be a good idea. Later, appellant and Wagner received copies of a magazine article published in the United States which convinced them that their broadcasts were heard in this country, and were quite effective, confirming appellant's contention that the fictitious news flashes were a good addition to his broadcasts (Tr. 215-217, 306-310, 331-333).

Early in 1943, Fritsch, who had theretofore been Wagner's deputy in the news editing office of the United States Zone of the Radio, took over Wagner's responsibilities as chief of the office, and from then on appellant worked under the supervision of Fritsch (Tr. 271, 1076). Appellant continued his work for the Radio until March, 1945 (Tr. 1078, 1079), when, in the face of approaching Russian troops the radio was evacuated from Berlin. Appellant was moved to Helmstedt in the west and from this point made a few additional broadcasts before the German collapse (Tr. 1462).

For the most part appellant wrote his manuscripts at home (Tr. 205). He personally brought them to the Radio where they were reviewed by Wagner, Fritsch, or Schotte. He then proceeded to the Radio's recording studios, where, with an announcer, either Charles Sittler or Edward Sittler, he made a recording of the manuscript. The words spoken both by the announcer and by appellant, who was the principal speaker on the programs, were written into the manuscript prepared by appellant and were appellant's own invention (Tr. 213-215, 334, 335, 367-369).

As appellant and the announcer spoke the words of the manuscript into a microphone in one room, technicians operated recording equipment in an adjoining room from which they could see the appellant and the program announcer through interconnecting windows and hear their voices through their amplifiers. At the beginning of a recording, appellant, or the announcer, would signal the technician to start the equipment. After the recording was made the technician frequently played it back so that appellant could check it for defects. Later other technicians, at the time of the actual transmission of the recording to the United States, played it back in the studio over technical equipment connected to radio antennas beamed to the United States (Tr. 357, 358, 367, 368, 376, 381, 382, 421, 422). The broadcasts so transmitted were received in the United States (Tr. 954 to 958).

Appellant took pride in and boasted of the success of his broadcasts. Their purpose, as he stated, was "to weaken the war will of America" (Tr. 1081, 1082). He claimed that they were the most effective broadcasts sent out by the German Radio to the United States (Tr. 227, 1083), and he boasted to the technicians that by means of one broadcast alone he had won a success for Germany as great as a naval victory (Tr. 645, 663, 669, 670, 696, 894, 915, 916).

C. Overt Acts Submitted to the Jury

A total of 13 overt acts was submitted to the jury. At the instance of the trial court, to simplify the proof, the remainder of the overt acts were withdrawn by the government from the jury's consideration. Those submitted to the jury were the following: Nos. 19, 20, 27, 29, 32, 35, 36, 46, 47, 54, 55, 56, and 60. The allegations of the indictment with respect to these 13 overt acts are similar. In each instance it is alleged that on or about a certain specified date, appellant, at Berlin, Germany, participated in the making of the recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German

Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation (App. 1-20). In each instance the overt act was proved by the direct testimony of two or more witnesses who were present at the making of the recording in the studio in the capacity of announcer, recording technician, or observer, and who were able at the time the recording was made to see appellant and to hear his voice as he spoke into the microphone. These overt acts witnesses also identified in court the original recording which had been made in the premises of the German Radio at the time the appellant spoke into the microphone in their presence, and identified appellant's voice on this recording. In each instance, the recording itself was introduced in evidence as a government exhibit (Gov't. Exhibits 6, 7, 8, 10, 11, 12, 13, 15, 16, 17, 18, 19, and 20 respectively; Tr. 941-945). And appellant, in giving his testimony, admitted that the recordings were made by him during the period of time covered by the indictment, for the use of the German Radio, to be broadcast to the United States as enemy propaganda (Tr. 1482 to 1486).

The witnesses who testified as to the overt acts submitted to the jury, and their position at the Radio, are as follows:

Overt Act No. 19. Witnesses: Sittler, announcer (Tr. 750, 751, 755, 756); Schroeder, technician (Tr. 863, 868).

Overt Act No. 20. Witnesses: Sittler, announcer (Tr. 761, 762); Schroeder, technician (Tr. 868, 870).

Overt Act No. 27. Witnesses: Sittler, announcer (Tr. 777, 778); Heilhecker, technician (Tr. 462 to 472); Schroeder, technician (Tr. 872-874); Fritsch, news editor (Tr. 1088-1092).

Overt Act No. 29. Witnesses: Sittler, announcer (Tr. 777, 778); Heilhecker, technician (Tr. 473-476); Schroeder, technician (Tr. 874-876); Fritsch, news editor (Tr. 1092-1094).

Overt Act No. 32. Witnesses: Sittler, announcer (Tr. 775-777); Heilhecker, technician (Tr. 476-478); Schroeder, technician (Tr. 877, 878, 882, 883).

Overt Act No. 35. Witnesses: Heilhecker, technician (Tr. 478, 479); Fritsch, news editor (Tr. 1094, 1095).

Overt Act No. 36. Witnesses: Schroeder, technician (Tr. 883-887); Fritsch, news editor (Tr. 1095, 1096).

Overt Act No. 46. Witnesses: Heilhecker, technician (Tr. 479-481); Schroeder, technician (Tr. 888-890).

Overt Act No. 47. Witnesses: Sittler, announcer (Tr. 771-775); Hoffman, technician (Tr. 638, 639); Fritsch, news editor (Tr. 1097).

Overt Act No. 54. Witnesses: Sittler, announcer (Tr. 764-766); Schroeder, technician (Tr. 891, 892); Fritsch, news editor (Tr. 1098, 1099).

Overt Act No. 55. Witnesses: Sittler, announcer (Tr. 766-768); Schweinhuber, technician (Tr. 562-564); Fritsch, news editor (Tr. 1099, 1100).

Overt Act No. 56. Witnesses: Sittler, announcer (Tr. 768, 769); Schweinhuber, technician (Tr. 565, 566); Fritsch, news editor (Tr. 1100, 1101).

Overt Act No. 60. Witnesses: Sittler, announcer (Tr. 769-771); Heilhecker, technician (Tr. 481, 482); Fritsch, news editor (Tr. 1101-1103).

D. Venue

After the German collapse appellant was apprehended and held in custody in Germany by members of the United States Armed Forces. On February 22, 1949, in the custody of an Army Lieutenant, he was placed on board a military plane and flown to the United States. The first stop made by this plane in the territory of the United States was at Bolling Field, Washington, D. C. At that point the Army officer having custody of appellant transferred him to the custody of a Special Agent of the Federal Bureau of Investigation (Tr. 99-101).

E. Appellant's Mental Condition

Appellant's wife, son, maid, and two acquaintances testified that appellant manifested eccentric behavior at various periods from 1925 onwards and in 1925 and 1938 he received psychiatric treatment from German doctors (Tr. 1185-1191, 1200-1205, 1209-1213, 1278, 1279, 1282, 1283, 1313, 1314, 1317-1320, 1324-1329, 1330-1333). However, during this time he continued in his employment, receiving increases in salary (Tr. 1248), he completed his University

education (Tr. 1259), and he continued to support his family (Tr. 1218, 1240, 1241, 1344). These incidents of eccentric behavior passed away and appellant then behaved normally (Tr. 1301-1303, 1306, 1308, 1356-1358).

A number of psychiatrists and medical doctors were called as witnesses. Dr. Centa, called as a defense witness, testified that as an Army doctor doing psychiatric work he examined appellant for less than an hour in September 1946 and signed a report stating that at that time appellant suffered from schizophrenic reaction. Dr. Centa was unable to recollect details of the examination. He stated that since he signed a report for the Army he must have made the examination and formed the opinion expressed therein (Tr. 1517, 1522, 1528, 1535, 1537, 1541).

Dr. Dyde, also called as a witness for defendant, testified that in 1946, as an Army psychiatrist, he had been a member of the same medical board as Dr. Centa and had made a detailed examination of appellant. Dr. Dyde asserted that in his opinion appellant suffered from schizophrenic reaction in 1946. This disease, he said, could have come on suddenly. He testified that he had no opinion whatsoever as to whether appellant was sane or insane in the period from the beginning of 1942 to 1945. It was Dr. Dyde's opinion that in 1946 appellant could distinguish right from wrong but could not act upon it. Dr. Dyde testified that his conclusions were based for the most part on what appellant said to him (Tr. 1577-1609).

Dr. Whitby, a Washington, D. C., psychiatrist, who was also called as a witness for the defense, examined appellant on the morning when he testified. At the time of the examination he had with him none of the tools of the profession for making a physical examination, and he stated that his opinion was based altogether on what the defendant said. Dr. Whitby testified that in his opinion, from 1942 to 1945, appellant knew the difference between right and wrong but could not adhere to the right and refrain from the wrong (Tr. 1817-1848).

Dr. Murray, a retired public health doctor who was not a psychiatrist, was called by the government. He testified

that he gave appellant a physical examination in 1939 and asked questions to elicit information disclosing mental abnormality. As a result of his examination he found evidence of some kidney disorder which might have affected appellant's moods, but no evidence of mental abnormality (Tr. 1803, 1805, 1853, 1854).

Dr. Kurtin, who was also called by the government, had been a United States Army physician in Germany in the summer of 1945, at which time he had examined appellant. Dr. Kurtin did not testify as a psychiatrist. He stated that the examination which he made of appellant was the same as that given to American military personnel being held for court-martial. At the time of his examination Dr. Kurtin found appellant to be normal physically and to be rational. He did not find evidence of a serious mental disturbance (Tr. 1680-1682, 1689, 1690, 1695).

Dr. Todd, a psychiatrist on the Commission on Mental Health for the District of Columbia, testified as a government witness on the basis of a complete psychiatric and physical examination which she had given appellant in June of 1949. Dr. Todd testified that in her opinion the appellant was sane when she examined him and was also sane from the period 1942 through 1945. During the period covered by the indictment, appellant, in her opinion, knew right from wrong and could adhere to the right and refrain from the wrong. It was also Dr. Todd's opinion that appellant had suffered from neurosis and not psychosis (Tr. 1700-1706).

The final psychiatrist who testified as to appellant's mental condition was Dr. Ruffin, who, like Dr. Todd, was a psychiatrist employed by the Commission on Mental Health by the District of Columbia and appeared as a government witness. Dr. Ruffin's testimony was, in substance, the same as that of Dr. Todd (Tr. 1862-1867).

Finally, appellant's former superior officer at the Embassy, Col. Lovell, was also called by the prosecution to testify with regard to appellant's mental condition. He stated that he had observed no irrational behavior on the

part of appellant in the years preceding Pearl Harbor (Tr. 1791).

SUMMARY OF ARGUMENT

I. A. Whether or not the act of speaking can constitute an overt act of treason depends upon whether the alleged act, considered in its setting, will sustain a finding that the accused intended to and actually did give aid and comfort to the enemy. An American citizen who in time of war enters the employ of the enemy and, pursuant to his employment, speaks into a microphone in a radio studio and makes recordings of his voice for the enemy's use in propaganda broadcasts, intending thereby to aid the enemy in its program of psychological warfare against the United States, treasonously adheres to that enemy and gives it aid and comfort.

B. The treason provision of the Constitution imposes no territorial limitation on the offense. Acting within its power, Congress has expressly applied the sanctions of treason to acts whether committed "within the United States or elsewhere." While a citizen in enemy territory owes qualified allegiance to a foreign government and must obey its laws, his permanent allegiance to the United States is not annulled and acts of adherence to the enemy with intent to betray, giving it aid and comfort, may be punished as treason.

II. A. The rule against compulsory self-incrimination does not require the exclusion of voice recordings, otherwise relevant, where the recordings were not appellant's property, were not taken from him, and he was not required to testify concerning them.

B. District Courts of the United States do not have authority to subpoena as witnesses aliens residing abroad. Appellant was not deprived of an opportunity to obtain the testimony of alien witnesses residing abroad, since he was granted permission to take their depositions.

C. Government employees in the District of Columbia are not challengeable as jurors solely by reason of their employment.

III. The Transcript of Record discloses that the trial court did not exclude evidence offered by appellant, as alleged in appellant's brief.

IV. A. While not purporting to summarize all the evidence in his charge to the jury, the trial judge did summarize it accurately and impartially, and correctly instructed the jury as to the applicable principles of law, leaving entirely in the hands of the jury the decision of the ultimate issues of fact.

B. The trial judge properly exercised his sound judicial discretion in interrogating expert witnesses to insure that the jury had a proper understanding of the case.

C. Appellant was not denied the testimony of any expert witness for whom he asked. In any event, the trial judge properly exercised his sound judicial discretion in limiting the number of expert witnesses on the issue of insanity to three for the defense and two for the prosecution.

V. The instruction given by the trial court on the question of intent properly stated the law as applied to the facts of the case and afforded appellant an opportunity to argue his interpretation of the facts before the jury.

ARGUMENT

I

THE INDICTMENT CHARGED THE OFFENSE OF TREASON

A. The alleged overt acts were sufficient

The offense charged to appellant is in substance identical with the offense charged in the indictment recently considered by this tribunal in *Gillars v. United States*, 182 F. (2d) 962 (1950), and by the Circuit Court of Appeals for the First Circuit, in *Chandler v. United States*, 171 F. (2d) 921 (1948), cert. den. 336 U. S. 918 (1949), and *Best v. United States*, F. (2d) (1950).

The same contentions attacking the validity of the indictment as are now being raised by appellant Burgman

were also raised in the *Gillars* appeal, i.e., that mere words and opinions cannot constitute overt acts of treason. The following excerpts from this Court's decision in the *Gillars* case (182 F. 2d at 971) fully dispose of appellant's arguments with respect to the overt acts:

There is no question in our mind that words may be an integral part of the commission of the crime if the elements which constitute treason are present; that is, if there is adherence to and the giving of aid and comfort to the enemy by an overt act proved by two witnesses, with intention to betray, though the overt act be committed through speech. A similar question has been similarly decided in *Chandler v. United States*, 171 F. (2d) 921 (1st Cir. 1948), *cert. denied*, 336 U. S. 918 (1948). See, also, *United States v. Best*, 76 F. Supp. 857 (D. Mass. 1948); *Rex v. Joyce*, 173 L. T. R. 377, *Affirmed sub nom, Joyce v. Director of Public Prosecutions*, (1946) A. C. 347; *Charge to Grand Jury—Treason*, 30 Fed. Cas. 1936, No. 18,272, at p. 1037 (C. C. S. D. Ohio 1861) [communication of intelligence to the enemy]; *Charge to Grand Jury—Treason*, 30 Fed. Cas. 1034, No. 18,271, at p. 1035 (C.C.S. D. N. Y. 1861) [advising, inciting or persuading others to give aid and comfort to the enemy]; and *Cramer v. United States*,* *supra*, at page 29. While the crime is not committed by mere expressions of opinion or criticism, words spoken as part of a program of propaganda warfare, in the course of employment by the enemy in its conduct of war against the United States, to which the accused owes allegiance, may be an integral part of the crime. There is evidence in this case of a course of conduct on behalf of the enemy in the prosecution of its war against the United States. The use of speech to this end, as the evidence permitted the jury to believe, made acts of words. The First Amendment does not protect one from accountability for words as such. It depends upon their use. It protects the free expression of thought and belief as a part of the liberty of the individual as a human personality. But words which reasonably viewed constitute acts in furtherance of a program of an enemy to which the speaker ad-

* 325 U. S. 1 (1945).

heres and to which he gives aid with intent to betray his own country, are not rid of criminal character merely because they are words.

B. Traitorous acts committed in enemy territory are punishable under the treason statute

Appellant asserts that the crime of treason under the law of the United States does not have extra-territorial scope. He argues that this follows from the general presumption against giving extra-territorial application to criminal statutes, and also because, as he says, treason is not committed by a citizen who resides in enemy country and therefore must engage in some trafficking with the enemy. Identical contentions were made by appellant in the *Gillars*' case. In disposing of them this court said (182 F. 2d at 979):

As to the first branch of the argument, the Supreme Court has decided that the Constitution does not forbid the application of the criminal laws of the United States to acts committed by its citizens abroad. It is a question in each case of the intent of the lawmakers.

"While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power." *Blackmer v. United States*, 284 U. S. 421, 437 (1931).

See, also, *United States v. Bowman*, 260 U. S. 94, 102 (1922); *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 357 (1908); *Skiriotes v. Florida*, 313 U. S. 69, 73 (1940).

The treason statute, enacted by the first Congress in 1790, *supra*,* condemns the giving to the enemy of "aid and comfort within the United States or elsewhere." This rebuts any presumption against extra-territorial application of our treason law which might have existed under the general rule. By the statute itself the overt act may be committed outside the United States. Adherence to the enemy and the treasonable intent, when they exist, attach to the act

* See: 182 F. 2d at 966, quoting 1 Stat. 112 (1790).

and to its perpetrator wherever he is. These factors too, therefore, may be outside the United States, and so, accordingly, may the whole of the crime. Aside from the intention of Congress expressed in the statute we are of the opinion that the usual presumption against extra-territorial application of the criminal law does not apply to treason. The purpose of a criminal statute ordinarily is to protect the domestic order, not to reach across national boundaries to take hold of persons within the jurisdiction of another nation. But treason is directed against the existence of the nation and by its nature consists of conduct which might ordinarily be exerted from without in aid of the enemy which is, usually, without. The act of adhering to the enemy, giving it aid and comfort, not unnaturally attaches to the enemy wherever it is. While the Constitution is silent on the question the statutory definition which quickly followed the Constitution was the handiwork of many of those who framed the greater instrument. The use in the statute therefore of the words, "within the United States or elsewhere," is strongly indicative of the territorial range of the constitutional provision. While treason shall consist only of that which is made so by the Constitution, while its nature is limited (*Cramer v. United States, supra**), the reasons which led the founders to circumscribe the conduct which would constitute the crime do not restrict its territorial reach. See discussions in the recent *Chandler* case, in both the District Court [72 F. Supp. 230 (D. Mass. 1947)] and in the Circuit Court of Appeals [*supra*]. See, also, the reasoning of the Court in *United States v. Bowman, supra*, and *United States v. Stephan*, 50 F. Supp. 738, 741 (E. D. Mich. 1943); 133 F. 2d 87, 99 (6th Cir. 1943), *cert. denied* 318 U. S. 781 (1943).

In considering the second part of appellant's contentions concerning the extra-territorial application of the treason statute, it should also be noted that appellant predicates error on the trial court's denial, as irrelevant, of appellant's prayer No. 12 (App. 50), setting forth appellant's obligation of local allegiance to Germany while domiciled in that country. A similar result was produced in the *Gillars'*

* 325 U. S. 1 (1945).

case when the trial court gave an instruction setting forth the defendant's obligation of local allegiance to the country of domicile but also instructed that this obligation was subordinate to the paramount obligation of "full, complete and true allegiance" owed to the country of her nationality.

In discussing and disposing of this aspect of the point now raised by appellant Burgman, this Court, in its *Gillars*' decision, said (182 F. 2d at 979, 980):

As a second branch of the present argument appellant states that a citizen of the United States residing in enemy country is under the obligation of local allegiance and one so situated is not guilty of treason by reason of some trafficking with the enemy. Therefore, it is said, doubt should be resolved against extra-territorial application. * * *

* * * obedience to the law of the country of domicile or residence—local allegiance—is permissible but this kind of allegiance does not call for adherence to the enemy and the giving of aid and comfort to it with disloyal intent. See *The Venus*, 8 Cranch 253, 12 U. S. 253 (1814). It would not be reasonable to say that treason can be committed only within the territory of the United States because the framers of the Constitution and the members of the First Congress must have known that some local allegiance was required of American citizens living in enemy territory. It is not disputed in this case that a citizen in enemy country owes temporary allegiance to the alien government, must obey its laws and may not plot or act against it. * * * But in a trial for treason involving the question of failure to live up to the obligation of allegiance attaching to citizenship the question is for the jury to determine on the evidence whether what was done fell within permissible obedience to a foreign power or within the area of treason.

II

THERE WAS NO VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

In view of the actual circumstances and the complete absence of citation of supporting authorities, appellant's allegations that his constitutional rights were invaded hardly seem to be made seriously.

A. The admission in evidence of recordings of appellant's voice did not violate the rule against compulsory self-incrimination

The recordings received in evidence, some of which were played back for the jury, were made by appellant in the course of his employment by the Overseas Service of the German Radio Broadcasting Corporation during the period covered by the indictment. They were recorded by appellant in the studios of the German Radio Broadcasting Corporation during the war, and were made for subsequent transmission as radio propaganda broadcasts to the United States. (Tr. 213-215, 334, 335, 357, 358, 367-369, 376, 381). These recordings were not the property of appellant, were not taken from him and were never in his possession. The fact that appellant's words, uttered for public dissemination and preserved by means of modern mechanical devices, were later capable of being reproduced as appellant had spoken them invaded none of appellant's constitutional rights. Furthermore, appellant voluntarily took the stand and admitted making these records (Tr. 1482).

Similar evidence was received in the *Gillars*' trial and the same constitutional objection was raised on appeal. In ruling that such evidence was properly admitted, this Court said (182 F. 2d at 973):

There was no compulsion upon the accused in the introduction of this evidence. It was not given in court by her at all. It consisted of reproductions of statements previously made by her. She had no part in their use at the trial except that they were a record of what she had said and done. The situation is analogous to that of an accused who had written a letter material to an issue on his trial. He could not object on constitutional grounds to its use in evidence merely because he was its author. The recordings here involved had been made to be heard over the air by uncounted numbers of persons. The constitutional provision relied upon does not prohibit the jury from hearing them if their contents are relevant and material to the case.

With respect to the analogy between voice recordings and written documents composed by appellant, see *United States v. White*, 322 U. S. 694 (1944), in which Justice Murphy said (p. 698):

The constitutional privilege against self-incrimination * * * is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him.

In this instance the words on the recordings were neither forced from appellant's lips nor was he forced to produce or authenticate the recordings. Moreover, it is well established that the papers and effects which the privilege protects must be the private property of the person claiming the privilege or at least in his possession in a purely personal capacity. *United States v. White, supra*; *Boyd v. United States*, 116 U. S. 616 (1886). See also *Chandler v. United States*, 171 F. 2d 921, 944 (1948), cert. den. 336 U. S. 918 (1949).

B. Appellant was not denied the right of compulsory process by the trial court's ruling that it had no authority to summon witnesses from abroad

The question as to the District Court's authority under the law to subpoena aliens residing abroad, is now raised before this Court for the second time by appellant. The background is as follows:

On April 26, 1949, appellant filed a motion in the District Court for defense witnesses at the expense of the United States, naming as his prospective witnesses certain aliens residing abroad (App. 22). This motion was denied on April 29, 1949 (App. 26). On May 2, 1949, appellant filed in this Court of Appeals, under the caption *Herbert John Burgman, Petitioner, vs. Henry H. Schweinhaut, United States District Judge, Respondent, No. 183, Misc.*, a petition for writ of mandamus asking that the District Court order production of witnesses desired by appellant

from abroad. By order dated May 26, 1949, this Court denied appellant's petition for writ of mandamus.

On June 16, 1949, appellant moved the District Court for the production of defense witnesses or in the alternative, order for authorization to take depositions. The prospective witnesses named in this motion were aliens residing abroad (App. 31). On June 30, 1949, appellant filed an amended motion for the production of witnesses or taking depositions (App. 34), and on the same date the presiding district judge entered an order granting in part and denying in part defendant's motion (App. 40). On July 20, 1949, appellant filed a motion for reconsideration requesting the District Court's permission to take depositions of certain aliens residing abroad (App. 44). On July 22, 1949, the presiding district judge entered an order granting appellant's motion for production of defense witnesses or in the alternative order for authorization to take depositions (App. 46). On July 26, 1949, a further order was entered by the presiding district judge directing the taking of the depositions of certain named aliens residing abroad by counsel for defendant (App. 47).

Pursuant to the order entered on July 26, 1949, counsel for appellant traveled abroad and took the depositions of various witnesses desired by him, including witnesses not named in the motions and orders referred to above. Portions of some of these depositions were offered in evidence by appellant.

In addition, defendant's son, Thomas Burgman, was brought to the United States by the Department of Justice at government expense to testify as a defense witness (Tr. 1147, 1148).

The identical question as to the authority of the Court to subpoena alien witnesses from abroad was raised in the *Gillars'* case. In then disposing of appellant's contentions (182 F. 2d at 978), this Court, after reciting the provisions of Rule 17(e)(2) of the Federal Rules of Criminal Procedure and 28 U. S. C., Section 1783, said:

Assuming that Rule 17(b), Fed. R. Crim. P., grants an indigent defendant, as was appellant, the right to

have a subpoena issue for a witness to appear from outside the United States, § 1783 would appear to preclude such a subpoena of an alien.

In *United States v. Best*, 76 F. Supp. 138, 139 (D. Mass. 1948) a similar request was denied on the ground,

"Aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena. They owe no allegiance to the United States. Cf. *Blackmer v. United States*, 284 U. S. 421, 52 S. Ct. 252, 76 L. Ed. 375."

The cited *Blackmer* case upheld a contempt conviction for failure of a citizen while abroad to respond to a subpoena issued pursuant to the aforementioned U. S. Code provision. The Court clearly considered the provision valid because it applied only to citizens.

It should further be noted that the question as to whether process shall be issued and served and the fees of witnesses paid under it is addressed to the sound judicial discretion of the trial court. *Casebeer v. Hudspeth*, 121 F. (2d) 914 (10th Cir. 1941), cert. den. 316 U. S. 683 (1942); *Gibson v. United States*, 53 F. (2d) 721 (8th Cir. 1931), cert. den. 285 U. S. 557 (1932). The Supreme Court has ruled that it will not review the exercise of such discretion. *Goldsby v. United States*, 160 U. S. 70 (1895); *Crumpton v. United States*, 138 U. S. 361 (1891).

In any event, appellant was not deprived of the testimony of the witnesses desired by him, since he was enabled to obtain such testimony by deposition.

C. Appellant was not denied the right to a trial by an impartial jury by the Court's refusal to exclude employees of the United States Government on the jury panel

On April 26, 1949 the defendant filed a motion for the exclusion of government employees from the jury panel (App. 24). This motion was denied as premature in an order entered by the presiding district judge on July 29, 1949 (App. 28). No similar motion was filed at a later date and no further order was entered in the record with respect to the exclusion of government employees from the jury panel. On October 11, 1949, at the time that the petit jurors were selected and sworn, no member of the panel was challenged

by the defendant on the grounds that he was an employee of the United States Government. There is no indication in the record, and it is not contended, that appellant was denied an opportunity to prove actual bias.

Under the circumstances it appears that prior to the empaneling of the jury appellant had abandoned any possible objection to the inclusion of government employees on the jury panel.

However, assuming *arguendo* that there was no such abandonment, it appears that there is no merit in the position taken by appellant.

It is now well settled that 49 Stat. 682, D. C. Code, § 11-1420 (1940), has entirely removed the disabilities which formerly, under *Crawford v. United States*, 212 U. S. 183 (1909), disqualified Government employees from service on District of Columbia juries in criminal cases. The ultimate authority on this point is the recent decision in *Dennis v. United States*, 339 U. S. 162 (1950), affirming 84 U. S. App. D. C. 31, 171 F. (2d) 986 (1948). The *Dennis* case, as does the instant case, involved an offense essentially political in its nature. Dennis, a prominent Communist Party official, was convicted in the District Court for the District of Columbia of violating R. S. § 102, 2 U. S. C. § 192, by wilfully failing to appear before the committee on Un-American activities of the United States House of Representatives in compliance with a subpoena duly served upon him. At the time of the selection of the jury for his trial Dennis challenged for cause each member of the panel who was a Government employee. These challenges were denied and seven of the twelve jurors finally selected were government employees. Dennis' principal contention was that the political atmosphere which prevailed in the District of Columbia at the time of the proceedings, because of the recent promulgation of Executive Order 9835, the so-called "Loyalty Order," produced an aura of surveillance and intimidation which militated against a fair trial. Dennis asserted that because of the Loyalty Order government employees would be hesitant to vote for acquittal because such action

might be interpreted as "sympathetic association" with Communism.

In upholding Dennis' conviction the Supreme Court referred to its rulings in *United States v. Wood*, 299 U. S. 123 (1936), which sustained the constitutionality of 49 Stat. 682, D. C. Code, § 11-1420 (1940), and *Frazier v. United States*, 335 U. S. 497 (1948), which upheld a conviction where the jury was composed entirely of federal government employees. In these decisions the Supreme Court had held that it was not proper to impute bias as a matter of law to government employees as jurors in criminal cases in the District of Columbia. Government employees, like other persons, were subject to challenge only for "actual bias."

The Court then ruled in the *Dennis* case (339 U. S. at 171, 172) that, despite the political nature of the offense charged to Dennis and the circumstances created by the issuance of the Loyalty Order:

We think the rule in *Wood* and *Frazier* should be uniformly applied. A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. The Act makes no exception for distinctive circumstances. It states that: "All . . . persons . . . whether employed in the Service of the Government of the United States or of the District of Columbia . . . shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service" Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury. We adhere to our holding that the enactment of the statute is within the power of Congress, and that therefore employees of the Federal Government are not challengeable solely by reason of their employment.

It follows that we are unable to conclude that the failure to sustain the challenge for cause denied petitioner an "impartial jury." "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States v. Wood*, *supra*, 145-

146. In this case, no more than the trial court can we without injustice take judicial notice of a miasma of fear to which Government employees are claimed to be peculiarly vulnerable—and from which other citizens are by implication immune. Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors, which duty this same Government has imposed upon them. There is no disclosure in this record that these jurors did not bring to bear, as is particularly the custom when personal liberty hinges on the determination, the sense of responsibility and the individual integrity by which men judge men.

The language of the *Dennis* case that “The act makes no exception for distinctive circumstances” and “the rule in *Wood* and *Frazier* must be uniformly applied” clearly leaves no room for distinguishing a treason prosecution from a trial for a lesser offense, such as was involved in the *Dennis* case.

See also *Lawson v. United States* and *Trumbo v. United States*, 176 F. 2d 49 (App. D. C. 1949), where appellants were charged with political offenses similar to that involved in the *Dennis* case. Appellants sought to challenge Government employees for cause. This Court sustained the denial of these challenges saying:

These matters were conclusively determined against appellants’ contentions by the recent cases of *Dennis v. United States** and *Frazier v. United States*.**

III

THE TRIAL COURT DID NOT IMPROPERLY EXCLUDE MATERIAL AND RELEVANT EVIDENCE OFFERED BY APPELLANT

Appellant asserts in the summary of argument included in his brief that “The trial court refused to admit evidence for the defendant as to a certain notice of expatriation which he received soon after the Embassy staff had evacuated leaving him in Berlin without his passport. This communication was by way of the Swiss Government, acting

* 84 App. D. C. 31, 171 F. 2d 986 (1948), aff’d 339 U. S. 162 (1950).

** 82 App. D. C. 332, 63 F. 2d 817 (1947), aff’d 335 U. S. 497 (1948).

as a neutral protecting power.” The point is not elucidated further in appellant’s brief.

This allegation does not conform to the facts. See Transcript of Record pages 550-560, 679-683, 1146, 1147, 1470-1481, 1763, and 1764. Particular attention is directed to pp. 1470, 1471, 1763, and 1764, where appellant Burgman testified that he did not consider himself a citizen of the United States at the end of 1941 or the beginning of 1942 for the reason that his United States passport had been withheld and, as he alleged, he subsequently received a letter from the Swiss Legation informing him that the United States Government had expatriated him. Appellant subsequently based one of his requests for instruction on this testimony. See App. 51 and *infra* pp. 36 *et seq.*

The transcript of the record clearly shows that every possible effort was made by the Government to assist in locating and making available for the use of appellant a copy of the letter from the Swiss authorities which he claimed to have received, that no copy of this letter could be found, and thereupon appellant, after explaining his failure to produce the letter, was permitted to testify as to its contents. There was thus no refusal to admit the evidence referred to in appellant’s brief.

IV

THE TRIAL COURT ACTED WITHIN THE BOUNDS OF JUDICIAL DISCRETION

A. The court properly exercised its discretion in commenting on the evidence

Appellant contends that the trial judge, in instructing the jury, inaccurately stated that “there is no testimony on the part of his [appellant’s] co-workers, either at the Embassy or at the German radio station, who had occasion to come in contact with the defendant regularly, that they saw him do or heard him say anything that was irrational, and it is reasonable to infer that to them he appeared to be rational. In fact, his superior officer at the Embassy and a physician stationed at the Embassy testified that the defendant appeared to them mentally normal.”

A review of the transcript of record indicates that the judge was meticulously correct in his summary of the tes-

timony. The following witnesses testified that they had been appellant's co-workers at the United States Embassy in Berlin prior to Pearl Harbor:

John R. Lovell (Tr. 121-137, 1789-1794)
 George Frost Kennan (Tr. 138-150)
 Hermann Stoesser (Tr. 150-179)
 Vance Bishop Murray (Tr. 1800-1805, 1852-1861)

In addition, the following witnesses testified that they had been appellant's co-workers at the German Radio Corporation in the period from 1942 to 1945:

Gerdt A. Wagner (Tr. 180-342)
 Paul Noback (Tr. 355-453)
 Marriane Heilhecker (Tr. 454-542)
 Rudolf Schweinhuber (Tr. 545-614)
 Ilse Kurzawa Hoffmann (Tr. 615-688)
 Gisela Mueller Lansdale (Tr. 689-738)
 Edward D. Sittler (Tr. 738-853)
 Ursula Schroeder (Tr. 861-939)
 Henry E. Fritsch (Tr. 1075-1134)

None of the above named witnesses testified as to any observation by them of irrational behavior upon the part of appellant and, as mentioned by the judge in his comments on the evidence, the witness Lovell, appellant's superior officer at the Embassy, and the witness Murray, a physician stationed at the Embassy, both testified that the defendant appeared to them mentally normal (Tr. 1791, 1794, 1805).

Appellant, when testifying on his own behalf, stated that he had been advised by a superior officer at the Embassy to apply for retirement on the grounds of mental disability (Tr. 1459). The officer referred to in appellant's testimony was not called as a witness to corroborate appellant's testimony. Such testimony by appellant is not inconsistent with and does not vitiate the judge's observation that "there is no testimony on the part of his co-workers * * * at the Embassy * * * that they saw him do or heard him say anything that was irrational * * *."

With regard to the judge's comment that the jurors could reasonably infer that appellant appeared to be rational to his former associates who testified as to actions on his part

but did not testify that they saw him do or heard him say anything that was irrational, such a remark was well within the latitude that is permitted to a Federal judge in instructing the jury. *Caminetti v. United States*, 242 U. S. 470, 492 to 495 (1917); *Arine v. United States*, 10 F. 2d 778 (9th Cir. 1926). See also *Dunlop v. United States*, 165 U. S. 486, 499, 500 (1897); *Lawson v. United States*, 176 F. 2d 49 (App. D. C. 1949).

It is axiomatic that the judge's charge to the jury must be construed as a whole. *Boyd v. United States*, 271 U. S. 104 (1926); *Schaefer v. United States*, 251 U. S. 466, 471 (1920); *Kinard v. United States*, 101 F. (2d) 246, 69 App. D. C. 322 (1938); *Sullivan v. District of Columbia*, 20 App. D. C. 29, 37 (1902); *Layman v. District of Columbia*, 19 App. D. C. 217, 232, 236 (1902). When this is done it is apparent that the jurors clearly understood that their decision must be based solely on the evidence adduced before them at the trial, that the judge's comments on the evidence were not binding on the jury, and that the jurors' own recollection of the evidence must prevail. See Transcript of Record, pp. 1995 and 1996, where, at the beginning of his charge, the judge instructed as follows:

It now becomes your duty to determine whether the defendant is guilty or not guilty of the offense with which he is charged.

This decision must be based solely on the evidence adduced before you at this trial. You must weigh the evidence objectively, impartially, and dispassionately, without feeling or emotion, without anger on the one hand, and without sympathy on the other.

As you no doubt are aware, it is the function of the Court, that is, it is my function and it is my duty to instruct the jury as to the law applicable to this case. You, ladies and gentlemen of the jury, are bound and obligated to follow the Court's instructions as to the law, but you are the sole judges of the facts, and you must determine the facts yourselves from the evidence adduced at this trial.

The Court is permitted to discuss the evidence and to comment on the facts and on the evidence in order to aid and assist the jury in arriving at its conclusions,

but the Court's comments on the facts and on the evidence are not binding on you and you need attach to them only such weight as you deem wise and proper, and if your recollection of the evidence in any particular differs from the Court's recollection, then your recollection must prevail, because, as I said before, the final decision on the facts is solely within your domain. My instructions are binding on you only as to the law.

See also Transcript of Record, p. 2024, where, at the close of his charge, the judge reiterated these instructions, as follows:

Bear in mind, as I have said to you before, that you are the sole judges of the facts, and you must reach your own conclusions on the facts, solely from the evidence adduced before you. If your understanding or recollection of the evidence differs in any particular from my recollection or understanding, then your recollection and your understanding must prevail.

In commenting on the evidence relating to the defense of insanity, the trial judge did not purport to discuss all the evidence (Tr. 2019). It was not incumbent upon him to do so. *Allis v. United States*, 155 U. S. 117 (1894). However, a complete review of that portion of the judge's charge to the jury dealing with the issue of insanity (Tr. 2015-2022) reveals that the trial judge impartially summarized the evidence, giving equal emphasis to the evidence favoring the prosecution and that favoring the accused. Moreover, he properly instructed the jury as to the applicable principles of law, and left entirely in the hands of the jury the decision of the ultimate issues of fact.

Since no rule of law was incorrectly stated and the matters of fact were ultimately submitted to the determination of the jury, the comments by the trial judge on the evidence are not subject to review on appeal. *Maxey v. United States*, 30 App. D. C. 63 (1907).

B. The court properly exercised its discretion in questioning expert witnesses

Appellant's contentions with respect to the interrogation by the trial judge of an expert witness called by the defense, Dr. Whitby, calls to mind the observation made in *United States v. Breen*, 96 F. (2d) 782, 784 (2d Cir. 1938), wherein it is said: "All too often, it seems, appellants like these become overcritical of a trial judge after conviction and on appeal seek to try him instead of the merits or demerits of their cause." Appellant's present contentions with respect to the manner in which the trial judge conducted the proceedings are somewhat in contrast to the remarks of his counsel just prior to the return of the jury's verdict. See Transcript of Record pp. 2041, 2042.

In order to appreciate the effect produced on the jury by the trial judge's interrogation of Dr. Whitby, it is necessary to examine the testimony of all expert witnesses. Three psychiatrists testified as experts on behalf of the defense and two additional psychiatrists testified as experts on behalf of the government. The judge intervened extensively during the questioning of each of these five witnesses. In every instance the judge's questions were relevant to the issues of the trial and were obviously asked for the purpose of fulfilling his obligation to see that the facts of the case were presented in such a way as to be understood by the jury as well as by himself. See the testimony of Dr. Centa, Tr. pp. 1515-1546; Dr. Dyde, Tr. pp. 1575-1611; Dr. Todd, Tr. pp. 1697-1747; Dr. Whitby, Tr. pp. 1817-1848; and Dr. Ruffin, Tr. pp. 1861-1867 and 1870-1894.

The question of the right of a trial judge to intervene in the interrogation of a witness was thoroughly examined by this court in the recent case of *Griffin v. United States*, 164 F. (2d) 903, 83 App. D. C. 351 (1947). This opinion makes it clear that: "There can be no question about the rule as to the right and duty of a federal court making proper inquiries of witnesses in any kind of a trial in order that the jury may have a proper understanding of the case." The decision quotes with approval from the opinion of Chief Justice Smyth in *Budd v. United States*, 48 App. D. C. 332,

336 (1919), which states that it is a “* * * rule which prevails in federal jurisdictions [that] the judge presiding at a trial, ‘has a right and indeed it is his duty, to see that the facts of the case are brought intelligently to the attention of the jury, and to what extent he will intervene for this end is a matter of discretion’ ”. See also *Glasser v. United States*, 315 U. S. 60 (1942); *McGuire v. United States*, 171 F. (2d) 136, 84 App. D. C. 64 (1948); *Simon v. United States*, 123 F. (2d) 80, 83 (4th Cir. 1941), *cert. den.* 314 U. S. 694 (1941); *United States v. Kay*, 101 F. (2d) 270, 272 (2d Cir. 1939).

The colloquy between the trial judge and counsel for accused, concerning the possible commitment of appellant in the event that he were found not guilty by reason of insanity, only a portion of which was quoted in appellant’s brief (see Tr. 1673-1675), did not, as appellant argues, manifest bias on the part of the judge against appellant’s witnesses or against appellant himself so as to dissipate the effect of testimony for appellant and prejudice the jury. This discussion took place at the bench, at the close of testimony for the day, in the absence of the jury, which had previously been excused, and prior to the appearance in court of Dr. Whitby, the effect of whose testimony appellant contends was dissipated by the attitude manifested by the judge in making his remarks. See Tr. 1669. Furthermore, when the complete record is examined, it is apparent that the action which the judge indicated he would take in the event of the accused’s possible acquittal by reason of insanity, i.e., committing appellant for a period of mental observation, was the procedure normally followed in all such instances (Tr. 1674). The court was merely discreetly notifying counsel for the accused of this fact to avoid possible surprise in the event of such a verdict of acquittal. It is clear that, rather than manifesting an attitude hostile to the accused, the trial judge was showing exceeding consideration.

A comprehensive review of the testimony given by each expert witness, carefully noting the court’s frequent intervention in the questioning, reveals nothing more than a

zealous endeavor by the trial judge to perform fully and conscientiously his duty "to see that the facts of the case are brought intelligently to the attention of the jury."

C. The court properly exercised its discretion in limiting the number of expert witnesses

It is well settled that the trial judge, in the exercise of his sound judicial discretion, may properly set a limitation upon the number of witnesses on a single point in issue. *Suhay v. United States*, 95 F. (2d) 890 (10th Cir. 1938), *cert. den.* 304 U. S. 580 (1938); *Brady v. United States*, 41 F. (2d) 449 (7th Cir. 1930); *Shaw v. United States*, 41 F. (2d) 26 (10th Cir. 1930); *Hamil v. United States*, 298 Fed. 369 (5th Cir. 1924); *Hauge v. United States*, 276 Fed. 111 (9th Cir. 1921); *Chapa v. United States*, 261 Fed. 775 (5th Cir. 1919), *cert. den.* 252 U. S. 583 (1920); *Samuels v. United States*, 232 Fed. 536 (8th Cir. 1916). See also *Michelson v. United States*, 335 U. S. 469 (1948); *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), *reh. den.* 310 U. S. 658 (1940); *Chapman v. United States*, 169 F. (2d) 641 (10th Cir. 1948). The reason for this rule, as applied to the testimony of experts, was aptly stated in the now venerable decision of *Winans v. N. Y. & Erie R. R. Co.*, 21 Howard 100 (1859), wherein it is said (p. 101):

Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount, and it often occurs that not only many days, but even weeks, are consumed in cross-examinations to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both Court and jury, and perplexing instead of elucidating the questions involved in the issue.

The factors which make it desirable for the trial court to dispense with cumulative expert testimony are set forth with admirable clarity in *Frazier v. Jennison*, 42 Mich. 206, 224, 3 N. W. 882 (1879), where, in approving a limitation to five expert witnesses on the issue of insanity, the court said:

If testamentary cases are ever to be brought to a conclusion, there must be some limit to the reception of expert evidence and that which was fixed in this case was quite liberal enough. To obtain such evidence is expensive, since desirable witnesses are not to be found in every community; but an army may be had if the Court will consent to their examination; and if legal controversies are to be determined by the preponderance of voices, wealth in all litigation in which expert evidence is important may prevail almost of course. But one familiar with such litigation cannot but know that, for the purposes of justice, the examination of two conscientious and intelligent experts on a side is better than to call more; and certainly, when five on each side have been examined, the limit of reasonable liberality has in most cases been reached. The jury cannot be aided by going farther. Little discrepancies that must be found in the testimony, of those even who in the main agree, begin to attract attention and occupy the mind, until at last jurors, with their minds on unimportant variances, come to think that expert evidence, from its very uncertainty, is worthless. This is not a desirable state of things and it can only be avoided by confining the use of expert evidence within reasonable bounds.

A review of the transcript of record reveals that appellant obtained the testimony of all the experts whom he asked to have as witnesses. Furthermore, he enjoyed a preponderance in the total number of expert witnesses—three testifying on his behalf as against two for the government. The day to day developments were as follows:

On October 27, 1949 (Tr. 1136-1139), after the government had rested its case, counsel for the accused requested that the court recess for one day stating as a reason, "I want to give more study to the matter of the testimony of psychiatrists that I would put on, and I want to have the advantage of two or three, I want to talk to two or three" etc. On November 2, 1949, (Tr. 1292-1299), appellant obtained a copy of a military medical report setting forth the results of a psychiatric examination made of appellant by Army doctors in the year 1946. It was indicated that subpoenas would be issued for the doctors who made the

report. On November 3, 1949 (Tr. 1417-1419), counsel for appellant informed the court that he desired any one of the three doctors named in the military medical report. Accordingly, the court issued an order for the appearance of Dr. Centa. On November 4, 1949, Dr. Centa, a qualified psychiatrist, appeared in court and gave testimony as an expert witness on behalf of appellant (Tr. 1515-1546). On this same day (Tr. 1522-1526) appellant, through his counsel, requested the presence of Dr. Dyde as an expert witness for the defense. Dr. Dyde had also been a member of the military board which made a psychiatric examination of appellant in the year 1946. This request was acceded to by the judge, who ordered the issuance of a subpoena for Dr. Dyde. On November 7, Dr. Dyde, a qualified psychiatrist, appeared in court and testified as an expert witness for appellant (Tr. 1575-1611). The witness fees and expenses of both Dr. Dyde and Dr. Centa were paid by the government.

After the completion of Dr. Dyde's testimony, the prosecution informed the court that it expected to call as an expert witness for the government on the issue of insanity one member of the Commission on Mental Health of the District of Columbia who had examined appellant in the year 1949. The accused, by his counsel, thereupon stated that he desired permission to subpoena an additional expert witness at the expense of the government. The judge then stated that in his opinion the defendant already had sufficient psychiatric testimony. See: Tr. 1670-1673.

On November 8, 1949, Dr. Todd, a psychiatrist on the Commission of Mental Health for the District of Columbia, testified as an expert witness on behalf of the government (Tr. 1697-1747). At the conclusion of Dr. Todd's testimony appellant moved to have Dr. Whitby called at the expense of the government as an expert witness on behalf of the defendant (Tr. 1754 to 1758). The court declined to issue an order as requested, stating: "I feel in view of the fact that two government physicians gave expert testimony favorable to the defendant, that the ends of justice

have been served from the defendant's standpoint and that there is no impelling reason for granting the present motion." The court further said: "I cannot designate an outside physician unless he is willing to testify without fee, because, unfortunately, Congress has not appropriated any money for the payment of expert witnesses. The authorities exist and the rules provide for that, but there must be funds and there are no funds available." Counsel for appellant thereupon stated: "Suppose we do this: I think Dr. Whitby is a reliable man, so I am going to ask him to appear. I am going to pay him myself." Counsel for the government then stated that if the defense was going to produce a third psychiatrist, then the prosecution deemed it would be entitled to a second psychiatrist as an expert witness.

The court granted both appellant's request for permission to call a third psychiatrist as a witness on his behalf at his own expense, and the prosecution's request for permission to call a second psychiatrist (Tr. 1805-1807, and 1748).

On November 9, 1949, Dr. Whitby, a qualified psychiatrist, appeared in court and testified as the third expert witness on behalf of appellant (Tr. 1817-1848). The government thereupon called, as its second expert witness, Dr. Ruffin, a psychiatrist on the Commission of Mental Health for the District of Columbia (Tr. 1861-1894).

At no time, in the course of the discussion with respect to the calling of expert witnesses, did appellant make any objection to the rulings by the trial judge.

Under the circumstances, there was clearly no abuse of discretion in the rulings of the trial court.

V

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE ISSUE OF INTENT

Appellant alleges that the trial court erroneously denied his Prayer No. 16 (App. 51) dealing with the element of intent.

Appellant testified that while in Germany during the war he believed that he had been expatriated as a United States citizen (*supra* pp. 26, 27). He then asked that the jury be instructed that:

If you were satisfied from all the evidence in the case that the defendant was under the honest belief that he no longer owed allegiance to the United States, then he could not be guilty of the act of treason and you must acquit him.

The court denied this request, but permitted defense counsel to argue this contention in summing up the case to the jury. See Tr. 1898, 1899, where the question was discussed as follows:

MR. LAUGHLIN: * * * Your Honor, my thought was it was rather difficult to prepare a prayer based on that, but, as I understand your Honor's ruling last week, it was to the effect that while it would not expatriate him, if he honestly believed that he had been expatriated it may go to the matter of intent.

THE COURT: I will not charge on that, but you may argue that, because intent is a state of mind and you may argue that.

There is a complete absence of proof in the record tending to show that appellant was, in fact, expatriated. Accordingly, his contentions with respect to his state of mind, or intent, are somewhat reminiscent of the "nice metaphysical distinction" set forth in *Hanauer v. Doane*, 12 Wallace 347 (1871), where certain claimants sued to recover money for military supplies used by military forces in a rebellion against the United States. It was objected that under the circumstances the transaction was illegal and therefore void. In passing on the question the Supreme Court said (*supra* p. 347):

He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted

to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the Rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act.

See also *Carlisle v. United States*, 16 Wallace 147 (1873); *Sprott v. United States*, 20 Wallace 459 (1874).

But in passing on the validity of appellant's objections it is necessary to consider the instruction actually given by the court on the issue of intent. It is well settled that the trial court is free to use language of its own choice in charging the jury, and if the court's instruction as given sufficiently covers the subject-matter, there is no error. *Wheeler v. United States*, 165 F. (2d) 225, 82 App. D. C. 363 (1947), *cert. den.* 333 U. S. 829 (1948); *Mostyn v. United States*, 64 F. (2d) 145, 62 App. D. C. 22 (1933).

The trial court's instruction on the issue of intent was as follows (Tr. 2003, 2004):

There is one additional element, however, that the Government must establish. There must be on the part of the defendant an intent to betray his country. An intent to betray one's country is an essential element of the crime of treason and must be proven in order to warrant a conviction. However, intent ordinarily cannot be proven directly, because there is no way of fathoming or scrutinizing the operations of the human mind. Intent may be and generally must be deduced from the circumstances, from things done and from things said.

A person is assumed to intend the possible consequences of his acts. Treasonable intent may be inferred from the defendant's conduct. It may be inferred from the act itself.

The law of treason assumes that every man intends the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts.

Proof that a citizen did give aid and comfort to the enemy may well be under the circumstances sufficient evidence, if the jury deems it such, that he adhered to

an enemy and intended and purposed to strike at his own country.

So, too, statements by the defendant may be considered by you and an inference from these statements may be drawn by you as to the existence or non-existence of an intent to betray his country.

This succinct, yet comprehensive, statement of the law as related to the facts of this case fully covered the subject-matter. *Chandler v. United States*, 171 F. (2d) 921 (1948), *cert. den.* 336 U. S. 918 (1949); *Best v. United States*, F. (2d) (1950); *Stephan v. United States*, 133 F. (2d) 87 (1943), *cert. den.* 318 U. S. 78 (1943); *United States v. Fricke*, 259 Fed. 673, 676 (1919); *United States v. Werner*, 247 Fed. 708, 709, 710 (1918). See also: *Haupt v. United States*, 330 U. S. 631, 641, 642 (1947); *Cramer v. United States*, 325 U. S. 1, 31, 32, 33, 55 (1945); *United States v. Burr*, 25 Fed. Cas. 52, 53, 54, No. 14,692h (C. C. Va. 1807); *United States v. Burr*, 25 Fed. Cas. 55, 90, No. 14,693 (C. C. Va. 1807); *The Ambrose Light*, 25 Fed. 408, 427 (D. C. N. Y. 1885).

In specifying that the prosecution must establish beyond a reasonable doubt that the accused had "an intent to betray his country" and that he "purposed and intended to strike at his own country," the court allowed the defendant ample latitude for an argument to the jury along the lines of his requested instruction (Tr. 1940, 1941). This argument, as is noted above, was based entirely upon allegations made by appellant when testifying in his own behalf. The instruction facilitated appellant's effort to convince the jury on the issue of intent by elucidating that "statements by the defendant may be considered by you and an inference from these statements may be drawn by you as to the existence or non-existence of an intent to betray his country."

Giving due regard to the facts and the issues in the case, it appears that the trial court properly instructed the jury on the issue of intent and committed no error in denying defendant's Prayer No. 16, quoted above.

CONCLUSION

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted,

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October 1950

APPENDIX

JOINT APPENDIX

(Stamp) Filed in Open Court Mar. 28, 1949, Harry M.
Hull, Clerk

1987 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA
 HOLDING A CRIMINAL TERM

No. 442-'49

Treason; 18 USC, Section 1 (1940 Edition) A. D. 1949

UNITED STATES OF AMERICA, *Plaintiff,*

1.

HERBERT JOHN BURGMAN, also known as JOE SCANLON,
Defendant.

DISTRICT OF COLUMBIA, ss:

The Grand Jurors for the United States of America, duly impaneled and sworn in the District Court of the United States for the District of Columbia and inquiring in and for that District, upon their oaths present:

1. That HERBERT JOHN BURGMAN, also known as JOE SCANLON, the defendant herein, was born in Hokah, Minnesota, on the 17th day of April, 1896, and he has been at all times mentioned herein, and is now, a citizen of the United States of America and a person owing allegiance to the United States of America.

2. That at Berlin, Germany, Koenigswusterhausen, Germany, and other places within the German Reich, and outside the jurisdiction of any particular State and district of the United States, continuously, and at all times begin-

ning on or about the 11th day of December, 1941, and continuing thereafter up to and including the 8th day of May, 1945, under the circumstances and conditions and in the manner and by the means hereinafter set forth, and then

and there being a citizen of the United States and 1988 a person owing allegiance to the United States, in violation of said duty of allegiance, the defendant, HERBERT JOHN BURGMAN, knowingly, intentionally, wilfully, unlawfully, feloniously, traitorously, and treasonably did adhere to certain enemies of the United States, and more particularly, to wit, the Government of the German Reich, with which the United States at all times since December 11, 1941, and during the times set forth in this indictment, was at war, and the German Radio Broadcasting Company, a company controlled by the German Government, and officials and employees thereof, giving to the said enemies of the United States aid and comfort, that is to say:

3. That the aforesaid adherence of said defendant, HERBERT JOHN BURGMAN, and the giving of aid and comfort by him to the aforesaid enemies of the United States during the period aforesaid, consisted of working as a radio speaker and commentator and as manager of a broadcasting station for the Overseas Service of the German Radio Broadcasting Company, a company controlled by the German Government, which work included the preparation and composition of commentaries, speeches, talks, discussions, dialogues and fictitious news reports, and the recording thereof, for subsequent broadcast by radio from Germany to the United States and elsewhere in such manner as to simulate radio programs and transmissions broadcast by a radio transmitting station situated in the United States.

4. That the aforesaid activities of said defendant, HERBERT JOHN BURGMAN, were intended to assist the German Government in its war effort, to persuade citizens and residents of the United States to decline to support the United States in the conduct of said war, to weaken and destroy the confidence of citizens and residents of the

United States in the administration of the Government of the United States, and to impair the morale of the members of the armed forces of the United States engaged in the prosecution of the war.

1989 5. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that in the prosecution, performance and execution of said treason and of said unlawful, traitorous and treasonable adhering and giving of aid and comfort to the enemies of the United States as aforesaid, the defendant, HERBERT JOHN BURGMAN, at the several times hereinafter set forth in the specifications hereof, being times when the United States was at war with the Government of the German Reich, unlawfully, feloniously, wilfully, knowingly, traitorously, and treasonably, and with treasonable intent to adhere to and give aid and comfort to said enemies, did perform, do, and commit certain overt and manifest acts which gave aid and comfort to said enemies, that is to say:

(1) That on a day between December 11, 1941, and February 28, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did enter the offices of the German Radio Broadcasting Corporation for the purpose of discussing with officials of the same his prospective employment by said corporation.

(2) That on a day between March 11, 1942, and April 5, 1942, at a time and on an occasion other than those specified in the other overt acts set forth in this indictment, but the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(3) That on a day between June 25, 1942, and July 31, 1942, at a time and on an occasion other than those specified in the other overt acts set forth in this indictment but the

exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany,

did participate in the making of a recording of a 1990 radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for a subsequent broadcast by said corporation.

(4) That on a day between June 1, 1942, and September 30, 1942, at a time and on an occasion other than those specified in the other overt acts set forth in this indictment but the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of the radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone at a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(5) That on a day between June 25, 1942, and July 31, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, in the offices of the USA Zone of the German Radio Broadcasting Corporation, did confer with officials of said USA Zone concerning possible changes or improvements in the radio program known as the "Station Debunk Broadcast" or the "F. A. Sendung."

(6) That on a day between July 1, 1942, and July 5, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin Germany, in the offices of the USA Zone of the German Radio Broadcasting Corporation, did confer with officials of said USA Zone concerning the text of a radio program known as the "Station Debunk Broadcast" or the "F. A. Sendung."

(7) That on a day between July 21, 1942, and July 27, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin,

Germany, in the offices of the USA Zone of the German Radio Broadcasting Corporation, did confer with officials of said USA Zone concerning the text of a radio program known as the "Station Debunk Broadcast" or the "F. A. Sendung."

(8) That on a day between August 20, 1942, and August 26, 1942, the exact date being to the Grand Jurors 1991 unknown, said defendant HERBERT JOHN BURGMAN, in the offices of the USA Zone of the German Radio Broadcasting Corporation, at Berlin, Germany, did confer with officials of said USA Zone concerning the text of a radio program known as the "Station Debunk Broadcast" or the "F. A. Sendung."

(9) That on a day between September 10, 1942, and December 31, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, in the offices of the USA Zone of the German Radio Broadcasting Corporation, in Berlin, Germany, did confer with officials of said USA Zone concerning the assignment of additional personnel to work on the radio program known as the "Station Debunk Broadcast" or the "F. A. Sendung."

(10) That on a day between January 1, 1943, and February 28, 1943, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did attend a meeting of commentators and officials of the German Radio Broadcasting Corporation in the office of the head of the USA Zone of said corporation.

(11) That on a day between April 1, 1944, and April 15, 1944, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, in the capacity of a commentator employed by the German Radio Broadcasting Corporation and the manager of "Station Debunk," did attend a meeting of the America Committee of the German Foreign Office.

(12) That on a day between May 24, 1944, and June 6, 1944, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin,

Germany, in the capacity of a commentator employed by the German Radio Broadcasting Corporation and the manager of "Station Debunk," did attend a meeting of the America Committee of the German Foreign Office.

1992 (13) That on a day between June 1, 1944, and July 17, 1944, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Koenigswusterhausen, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone at a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(14) That on a day between June 15, 1944, and September 15, 1944, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, in the capacity of a commentator employed by the German Radio Broadcasting Corporation and the manager of "Station Debunk," did attend a meeting of the America Committee of the German Foreign Office.

(15) That on a day between December 1, 1944, and January 31, 1945, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Koenigswusterhausen, Germany, did enter a recording studio of the German Radio Broadcasting Corporation for the purpose of participating in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," for subsequent broadcast by said corporation.

(16) That on or about January 7, 1945, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, in the capacity of a commentator employed by the German Radio Broadcasting Corporation and the manager of "Station Debunk," did attend a meeting of the America Committee of the German Foreign Office.

(17) That on or about April 29, 1942, the exact date being to the Grand Jurors unknown, said defendant, HER-

BERT JOHN BURGMAN, at Berlin, Germany, did 1993 participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(18) That on or about April 30, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(19) That on or about May 2, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5722, was made for subsequent broadcast by said corporation.

(20) That on or about May 2, 1942, the exact date being to the Grand Jurors unknown, but the day being the same as that specified in overt act No. 19 of this indictment, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sedung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5723, was made for subsequent broadcast by said corporation.

(21) That on or about May 4, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did partici-

1994 pate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(22) That on or about May 5, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(23) That on or about May 23, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5892, was made for subsequent broadcast by said corporation.

(24) That on or about May 23, 1942, the exact date being to the Grand Jurors unknown, but the day being the same as that specified in Overt Act No. 23 of this indictment, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the markings K5893, was made for subsequent broadcast by said corporation.

1995 (25) That on or about June 18, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio pro-

gram, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(26) That on or about June 20, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(27) That on or about June 22, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(28) That on or about June 23, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(29) That on or about June 24, 1942, the exact date being to the Grand Jurors unknown, said defendant,
 1996 HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Cor-

poration, which recorded program was made for subsequent broadcast by said corporation.

(30) That on or about June 25, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(31) That on or about June 29, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(32) That on or about June 30, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(33) That on or about July 7, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(34) That on or about July 8, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT

JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(35) That on or about July 9, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(36) That on or about July 14, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(37) That on or about July 15, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. 1998 Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(38) That on or about July 20, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by

speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(39) That on or about July 21, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(40) That on or about July 22, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(41) That on or about July 23, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

1999 (42) That on or about July 24, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(43) That on or about July 25, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(44) That on or about July 27, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(45) That on or about July 28, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

2000 (46) That on or about July 29, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(47) That on or about August 5, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did par-

ticipate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(48) That on or about August 6, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(49) That on or about August 8, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation

2001 (50) That on or about August 10, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(51) That on or about August 11, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording

studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(52) That on or about August 13, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(53) That on or about August 15, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking 5434K, was made for subsequent broadcast by said corporation.

2002 (54) That on or about August 15, 1942, the exact date being to the Grand Jurors unknown, but the day being the same as that specified in Overt Act No. 53 of this indictment, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking 5435K, was made for subsequent broadcast by said corporation.

(55) That on or about August 22, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording

studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5491, was made for subsequent broadcast by said corporation.

(56) That on or about August 22, 1942, the exact date being to the Grand Jurors unknown, but the day being the same as that specified in Overt Act No. 55 of this indictment, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5492, was made for subsequent broadcast by said corporation.

(57) That on or about August 26, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

2003 (58) That on or about August 27, 1942, the exact date to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

(59) That on or about August 29, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation,

which recorded program, the records of which bear the marking K5507 or the marking 5507K, was made for subsequent broadcast by said corporation.

(60) That on or about August 29, 1942, the exact date being to the Grand Jurors unknown, but the day being the same as that specified in Overt Act No. 59 of this indictment, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5508, was made for subsequent broadcast by said corporation.

(61) That on or about August 31, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

2004 (62) That on or about September 1, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5580, was made for subsequent broadcast by said corporation.

(63) That on or about September 1, 1942, the exact date being to the Grand Jurors unknown, but the day being the same as that specified in Overt Act No. 62 of this indictment, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk

Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5581, was made for subsequent broadcast by said corporation.

(64) That on or about September 3, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5582, was made for subsequent broadcast by said corporation.

(65) That on or about September 3, 1942, the exact date being to the Grand Jurors unknown, but the day being the same as that specified in Overt Act No. 64 of this indictment, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5583, was made for subsequent broadcast by said corporation.

(66) That on or about September 5, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5584, was made for subsequent broadcast by said corporation.

(67) That on or about September 5, 1942, the exact date being to the Grand Jurors unknown, but the day being the same as that specified in Overt Act No. 66 of this indictment,

ment, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program, the records of which bear the marking K5585, was made for subsequent broadcast by said corporation.

(68) That on or about September 8, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

2006 (69) That on or about September 19, 1942, the exact date being to the Grand Jurors unknown, said defendant, HERBERT JOHN BURGMAN, at Berlin, Germany, did participate in the making of a recording of a radio program, known as the "Station Debunk Broadcast" or the "F. A. Sendung," by speaking into a microphone in a recording studio of the German Radio Broadcasting Corporation, which recorded program was made for subsequent broadcast by said corporation.

That said defendant, HERBERT JOHN BURGMAN, committed each and every one of the overt acts herein described with treasonable intent and for the purpose of, and with the intent to adhere to and give aid and comfort to the Government of the German Reich, and to the German Radio Broadcasting Company and officials and employees thereof, enemies of the United States, and said defendant, HERBERT JOHN BURGMAN, committed each and every one of said overt acts contrary to his duty of allegiance to the United States and to the form of the statute and Constitution in such case made and provided and against the peace and dignity of the United States.

That the District of Columbia was the Federal Judicial District into which the defendant was first brought after the commission of the aforesaid offense.

A TRUE BILL

WALLACE MURRAY, .
Foreman.

ALEXANDER M. CAMPBELL,
Assistant Attorney General

GEORGE MORRIS FAY,
United States Attorney

VICTOR C. WOERHEIDE,
Special Assistant to the Attorney General

DOROTHY L. FILLIUS,
Special Attorney.

(Stamp) Filed Apr. 1, 1949, Harry M. Hull, Clerk

2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49
Charge: Treason

UNITED STATES,

vs.

HERBERT JOHN BURGMAN, alias JOE SCANLON, *Defendant.*

Plea of Defendant.

On this 1st day of April, 1949, the defendant, Herbert John Burgman, alias Joe Scanlon, appearing in proper person and by his attorney James J. Laughlin, being arraigned

in open Court upon the indictment, the same being read to him, pleads Not Guilty thereto.

By direction of
 RICHMOND B. KEECH,
Presiding Judge.

HARRY M. HULL, Clerk.
 By PAUL A. ROSEN,
Deputy.

Present:

By VICTOR C. WOERHEIDE,
Special Assistant to the Atty. Gen'l.

L. H. POWELL,
Official Reporter.

2008 IN THE DISTRICT COURT OF THE UNITED STATES
 FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES

VS.

HERBERT BURGMAN

**Affidavit in Support of Application for Leave to Proceed
 Without Prepayment of Costs.**

I, Herbert John Burgman, being first duly sworn according to law, depose and say that I am the defendant in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.

3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows:

HERBERT JOHN BURGMAN.

Subscribed and sworn to before me this 19th day of April 1949.

HARRY M. HULL,
*Clerk, United States
 District Court for the
 District of Columbia*

By CHARLES J. RAMSEY,
Deputy Clerk.

Let the defendant proceed without prepayment of costs.

HENRY A. SCHWEINHOUT,
Presiding Judge.

(Stamp) Filed Apr. 26, 1949, Harry M. Hull, Clerk

2009 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

HERBERT JOHN BURGMAN, also known as JOE SCANLON,
Defendant.

Motion for Defense Witnesses at the Expense of the United States.

Now comes the defendant and moves the Court for an order requiring the production of witnesses from points in Germany at the expense of the United States. The following are the reasons:

The defendant cannot safely go to trial and defend himself without these witnesses from Germany inasmuch as the offenses are alleged to have been committed in Germany. He has certain witnesses who have knowledge of his broadcasts and also witnesses who can contradict certain prosecution witnesses. This motion will be elaborated upon at the time of oral argument.

JAMES J. LAUGHLIN
National Press Building
Counsel for Defendant

I certify that I have this day mailed copy of this motion to Victor Woerheide, Esq., Department of Justice, Washington, D. C.

JAMES J. LAUGHLIN

This the — day of April, 1949.

(Stamp) Filed Apr. 26, 1949, Harry M. Hull, Clerk

2010 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff*,
vs.
HERBERT JOHN BURGMAN, also known as JOE SCANLON,
Defendant.

Motion to Suppress Recordings.

Now comes the defendant and moves the Court for an order suppressing recordings in this case inasmuch as said records constitute a violation of the Fourth Amendment to the Constitution.

JAMES J. LAUGHLIN
National Press Building
Counsel for Defendant

I certify that I have this day mailed copy of this motion to Victor Woerheide, Esq., Department of Justice, Washington, D. C.

JAMES J. LAUGHLIN

This the 26th day of April, 1949.

(Stamp) Filed Apr. 26, 1949, Harry M. Hull, Clerk
2011 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

HERBERT JOHN BURGMAN, also known as JOE SCANLON,
Defendant.

**Motion for Exclusion of Government Employees From the
Jury Panel.**

Now comes the defendant and moves the Court for an order excluding from the jury panel all persons employed by the United States Government inasmuch as the offense herein is treason—an offense striking at the very existence of the Government—and since the mere making of the charge of treason is calculated to excite prejudice against an accused it is believed that employees of the Government could not deal fairly and impartially with the defendant and that they would be fearful if they returned a verdict of acquittal that their Government job would be in peril.

JAMES J. LAUGHLIN
National Press Building
Counsel for Defendant

I certify that I have this day mailed copy of this motion to Victor Woerheide, Esq., Department of Justice, Washington, D. C.

JAMES J. LAUGHLIN

This the 26th day of April, 1949.

(Stamp) Filed Apr. 26, 1949, Harry M. Hull, Clerk
2012 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

HERBERT JOHN BURGMAN, also known as JOE SCANLON,
Defendant.

Motion to Dismiss.

Now comes the defendant and moves the Court for an order dismissing the indictment for the following reasons:

1. The indictment does not comply with the Rules of Criminal Procedure, inasmuch as it has embodied in it matter of such a comprehensive nature as to make it virtually impossible to defend. The rules of Criminal Procedure require a clear and succinct statement of the offense and the purpose of the rule is to simplify procedure in the Federal courts. Said rule has been well thought out and should not be departed from.

2. The allegations contained in the indictment do not constitute treason within the meaning of *Cramer v. United States*, 325 U. S. 1, 65 S. Ct. 918.

3. The grand jury returning said indictment was composed of many employees of the Government and many

members of said panel were Jews. This denied to the defendant a fair and impartial consideration to which he was entitled. This point will be elaborated upon in the oral argument.

2013 4. The grand jury was illegally constituted inasmuch as it did not constitute a fair and proper cross section of the community.

JAMES J. LAUGHLIN
National Press Building
Counsel for Defendant

I certify that I have this day mailed copy of this motion to Victor Woerheide, Esq., Department of Justice, Washington, D. C.

JAMES J. LAUGHLIN

This the 26th day of April, 1949.

(Stamp) Filed Apr. 29, 1949, Harry M. Hull, Clerk

2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49
Charge: Treason

UNITED STATES

vs.

HERBERT JOHN BURGMAN, *Defendant*.

On this 29th day of April, A. D., 1949, comes the defendant, Herbert John Burgman, appearing in proper person, and by his attorney, James J. Laughlin, Esq., and thereupon, upon consideration of the Motion of the said defendant to have defense witnesses at the expense of the

Government, it is ORDERED that the said Motion be and the same is hereby denied.

By direction of

HENRY A. SCHWEINHOUT,
Presiding Judge

HARRY M. HULL, *Clerk*

By C. H. MILSTEAD,
Deputy Clerk.

Present:

United States Attorney

By VICTOR C. WOERHEIDE
Spec. Asst. to the Atty. Gen'l.

RALPH MINIER,
Official Reporter

(Stamp) Filed Apr. 29, 1949, Harry M. Hull, Clerk

2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49
Charge: Treason

UNITED STATES

vs.

HERBERT JOHN BURGMAN, *Defendant.*

On this 29th day of April, A. D., 1949, comes the defendant Herbert John Burgman, appearing in proper person, and by his attorney, James J. Laughlin, Esq., and thereupon, upon consideration of the Motion of the said defendant to suppress recordings, it is ORDERED that the said

Motion be and the same is hereby denied without prejudice as premature.

By direction of

HENRY A. SCHWEINHOUT,
Presiding Judge

HARRY M. HULL, *Clerk*

By C. H. MILSTEAD,
Deputy Clerk.

Present:

United States Attorney

By VICTOR C. WOERHEIDE
Spec. Asst. to the Atty. Gen'l.

RALPH MINIER,
Official Reporter

(Stamp) Filed Apr. 29, 1949, Harry M. Hull, Clerk

2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49
Charge: Treason

UNITED STATES

vs.

HERBERT JOHN BURGMAN, *Defendant.*

On this 29th day of April, A. D., 1949, comes the defendant, Herbert John Burgman, appearing in proper person, and by his attorney, James J. Laughlin, Esq., and thereupon, upon consideration of the Motion of the said defendant for exclusion of Government employees from the

jury panel, it is ORDERED, that the said Motion be and the same is hereby denied without prejudice as premature.

By direction of

HENRY A. SCHWEINHOUT,
Presiding Judge

HARRY M. HULL, *Clerk*

By C. H. MILSTEAD,
Deputy Clerk.

Present:

United States Attorney

By VICTOR C. WOERHEIDE
Spec. Asst. to the Atty. Gen'l.

RALPH MINIER,
Official Reporter

(Stamp) Filed Apr. 29, 1949, Harry M. Hull, Clerk

2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49
Charge: Treason

UNITED STATES

VS.

HERBERT JOHN BURGMAN, *Defendant.*

On this 29th day of April, A. D., 1949, comes the defendant, Herbert John Burgman, appearing in proper person and by his attorney, James J. Laughlin, Esq., and thereupon, upon consideration of the Motion of the said defendant to Dismiss as to Items Nos. 1, 2, 3, it is ORDERED that the said Motion be and the same is hereby denied.

Item No. 4 of the said Motion is withdrawn by attorney for the defendant.

By direction of

HENRY A. SCHWEINHOUT,
Presiding Judge

HARRY M. HULL, *Clerk*

By C. H. MILSTEAD,
Deputy Clerk.

Present:

United States Attorney

By VICTOR C. WOERHEIDE
Special Assistant to the Atty. Gen.

RALPH MINIER,
Official Reporter

(Stamp) Filed May 9, 1949, Harry M. Hull, Clerk

2018 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA

v.

HERBERT JOHN BURGMAN

Order.

A motion having been made by the Government requesting that a determination as to defendant's mental condition be made by this court prior to the trial on the merits, and it appearing that the defendant has a history of medical treatment for a nervous condition or disorder prior to the

commission of the acts alleged in the indictment now pending against him; and

After due consideration of the matters presented, it is

ORDERED that the Commission on Mental Health examine the defendant and conduct an investigation to determine his mental condition, submitting a report to this court.

H. A. SCHWEINHAUT,
United States District Judge.

May 9th, 1949

(Stamp) Filed June 17, 1949, Harry M. Hull, Clerk

2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

HERBERT JOHN BURGMAN, *Defendant.*

Motion for Production of Defense Witnesses or in the Alternative, Order for Authorization to Take Depositions.

Now comes the defendant through his counsel and moves the Court for an order requiring the production of defense witnesses from Germany at the expense of the United States, or in the alternative, for an order under Rule 15C, Rules of Criminal Procedure, authorizing the taking of depositions at the expense of the United States. At the present time, defendant desires to take the deposition of the following persons:

R. J. Boehringer, 16 Klueterstrasse, (21a) Detmold, Germany

Franz Schafer, Runstedt via Helmstedt (20b), British Zone, Germany

Erwin Christiani, Lobach/Holzminden (20b) Germany
 Emil W. K. Beckman, Schlewecke (Motte), Kreis Gandersheim, Germany (British Zone)

Rudolf Kranz, Frauleins Pahl, Skarstupeit, and Swennesen, all of the Berlin Broadcasting Company, Berlin, Germany

Mrs. Paula Sexauer, Ortrud Strasse 7, Berlin-Friedenan, Germany

Dr. Grage, City Hospital, Chemnitz, Germany

Thomas Burgman, Liebfrauen Strasse 95, Darmstadt, U. S. Zone, Germany.

2020 The witnesses Boehringer and Beckman have personal knowledge of defendant's broadcasting activities and can testify there was never any intent to betray the United States, and that the broadcasting was done through duress and coercion and not through choice, and that had the defendant refused to do the broadcasting his life would have been in danger and he would have been sent to a concentration camp and would have suffered death or serious bodily harm. These witnesses can also furnish information as to the activities of certain witnesses called to testify on behalf of the Government and can show that these witnesses are not voluntary witnesses, and are testifying as a result of promises made to the witnesses and members of their families. All of this will have a great bearing on the credibility of the witnesses testifying against the defendant. Defendant says further that certain favors have been shown said witnesses by persons connected with this prosecution.

The witnesses Schafer and Christiani can also contradict in material respects testimony of prosecution witnesses, particularly Houben, Inge, Doman, Schnell, Von Richter, Plack, and other persons who it is expected will be used as witnesses against the defendant. These witnesses can testify as to conditions existing in Germany during the war insofar as broadcasting was concerned, and can testify as to the conditions under which the broadcasting work was done and what would happen to the broadcaster if he attempted to cease broadcasting.

The witnesses Kranz, Pahl, Skarstupeit, Swennesen, Sexauer, Grage and Burgman can all testify to defendant's mental condition during the period covered by the indictment and will show that he was not criminally responsible for any of his actions because of mental incapability.

The witness Thomas Burgman is the son of the defendant and lived with him continuously during the times mentioned in the indictment.

Defendant says unto the Court that there is already on file an affidavit of poverty showing that he is without funds and is unable to pay for the cost of the production of witnesses from Germany or to pay the cost of taking of depositions.

Defendant requests that this Court order the production of these witnesses from Germany at the expense of the United States or authorize and direct the taking of their depositions in accordance with Rule 15C, Rules of Criminal Procedure, and all expenses incident thereto be paid for by the United States Government.

Defendant has already certified that the witnesses are material and important and that he cannot safely go to trial without them.

Defendant desires to point out that certain records in Germany will reveal that at one period of time between 1940 and 1944 the defendant was incarcerated in a mental institution and he has been unable to obtain the records with respect to this up to this time. He asks that he be given permission to take whatever depositions are necessary in Germany that will throw light on his mental condition. Defendant says unto the Court that he contends that he is now of sound mind and suffers from no mental infirmity, but he further states that at the time of the broadcasting or rather at the time of the acts alleged to have been committed, as named in the indictment, he was of unsound mind and therefore was not responsible for these acts. It follows, therefore, it would be important, in the interest of justice, that all information pos-

sible be obtained on this subject for the benefit of the Court and the jury.

JAMES J. LAUGHLIN
National Press Building
Counsel for Defendant

I certify that I have this day mailed copy of this motion to Dorothy Fillius, Attorney, Criminal Division, Department of Justice, Washington, D. C.

JAMES J. LAUGHLIN

This the 16th day of June, 1949.

(Stamp) Filed June 30, 1949, Harry M. Hull, Clerk
2023 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

VS.

HERBERT JOHN BURGMAN, *Defendant.*

**Amended Motion for Production of Defense Witnesses or
in the Alternative, Order for Authorization to Take
Depositions.**

Now comes the defendant through his counsel and moves the Court for an order requiring the production of defense witnesses from Germany at the expense of the United States, or in the alternative, for an order under Rule 15C, Rules of Criminal Procedure, authorizing the taking of depositions at the expense of the United States. At the present time the defendant desires the presence of the following witnesses:

R. J. Boehringer, 16 Klueterstrasse, (21a) Detmold, Germany

Franz Schafer, Runstedt via Helmstedt (20b), British Zone, Germany

Erwin Christiani, Lobach/Holzminden (20b) Germany

Emil W. K. Beckman, Schlewecke (Motte), Kreis Gandersheim, Germany (British Zone)

Rudolf Kranz, Frauleins Pahl, Skarstupeit, and Swennesen, all of the Berlin Broadcasting Company, Berlin, Germany

Mrs. Paula Sexauer, Ortrud Strasse 7, Berlin-Friedenan, Germany

Dr. Grage, City Hospital, Chemnitz, Germany

Thomas Burgman, Liebfrauen Strasse 95, Darmstadt, U. S. Zone, Germany.

2024 The witnesses Boehringer and Beckman have actual knowledge of defendant's broadcasting activities and can testify there never was any intent to betray the United States, and that the broadcasting was done through duress and coercion and not through choice, and that had the defendant refused to do the broadcasting his life would have been in danger and he would have been sent to a concentration camp and could have suffered death or serious bodily harm. These witnesses can testify that they had had conversations with the defendant Burgman and that he did not desire to do any broadcasting for the benefit of the German Government, but that he had been denied the protection of the Government of the United States and that he was required to sign papers which had the effect of expatriating him, and that he no longer owed allegiance to the Government of the United States. These witnesses can further testify that Burgman endeavored to leave Germany in the outbreak of hostilities, that is to say, in December, 1941, but was prevented from doing so due to the fact that he was called on the telephone by certain officers of the United States connected with the Embassy in Berlin, and was instructed to join them at a certain time. Only a few hours notice was given. Defendant wanted to leave but informed these officers that he was ill

in bed and could not depart at that time, and the officers left without Burgman. Burgman was therefore at the mercy of the German Government and was given a choice of broadcasting or forfeiting his life.

These witnesses can also contradict the testimony of certain witnesses who will testify on behalf of the Government against defendant and they can testify that the Government witnesses are not voluntary witnesses but
2025 are testifying as a result of promises made to witnesses by persons connected with our Government and promises made also to the families of said witnesses by persons connected with our Government. These witnesses can give further testimony contradicting the testimony of Government witnesses.

These witnesses can further testify that they were personally acquainted with the following witnesses, some, if not all, of whom will testify against the defendant: Ulrich Haupt, E. Adelbert Houben, Paul Noback, Werner Plack, Georg Heinrich Schnell, Hans von Richter, Inge Sylvia Doman, as well as other witnesses who will be called to testify against the defendant.

The witnesses Schafer and Christiani can also contradict in material respects testimony of prosecution witnesses, particularly Haupt, Houben, Noback, Plack, Schnell, von Richter and Doman, and other persons who it is expected will be used as witnesses against defendant.

The witnesses Schafer and Christiani can testify that they have personally conferred with a number of these Government witnesses who have stated to the said Schafer and Christiani that certain favors have been done for them to induce them to testify and that the said witnesses are not voluntary witnesses but are testifying as a result of promises made to them and under fear of reprisals, both to the witnesses themselves and to members of their families. The witnesses Schafer and Christiani can testify also as to conditions existing in Germany during the war insofar as broadcasting was concerned, and can testify as to the conditions under which the broadcasting work was done and what would happen to the broadcaster if he

attempted to cease broadcasting. The witness
 2026 Schafer can testify that on many occasions he talked to the defendant Burgman, who stated that he had to continue his broadcasting and if he failed to do so his life would be in danger. Both the witness Schafer and Christiani can testify that they have talked with other people who had knowledge of the defendant Burgman's broadcasting and that the defendant Burgman never intended to do anything detrimental to the United States Government. They can also testify that due to the action of our Government in causing a virtual expatriation of Burgman, he no longer owed allegiance to the Government of the United States and could not leave Germany at the time of the outbreak of hostilities due to the fact that the officials of our Embassy in Berlin refused to assist him in leaving Germany. The witness Schafer can also testify, as can the witness Boehringer and Beckman, that the defendant Burgman's mental condition was a topic of conversation during the time of defendant's broadcasts and it was the view of these witnesses that the defendant Burgman was mentally unstable. Their testimony will point out certain mannerisms, eccentricities and statements made by the defendant Burgman showing a lack of mental stability to a degree that would absolve him criminally.

The witnesses Kranz, Pahl, Skarstupeit, Swennesen, Sexauer, and Grage can all testify to the mental condition of defendant during the period named in the indictment and will show he was not responsible for any of his actions because of a lack of mental responsibility. They will particularize incidents and activities at various times and places by the defendant Burgman showing a lack of mental responsibility. One or more of these witnesses will testify that the defendant Burgman, while broadcasting on one
 2027 or more occasions, stood on his head. Another witness will testify that on one occasion the defendant Burgman ate a picture of Hitler. These witnesses, as well as the witness Schafer and Beckman, can testify that on other occasions the defendant Burgman endangered his life by making statements about and mimick-

ing certain of the high Nazi officials, such as Hitler, Goering, Goebbels, von Ribbentrop, in a manner that a sane person would not have done in Germany in the midst of total war. Certain of these witnesses can also testify that on an occasion at the conclusion of Burgman's regular broadcast, he made a statement substantially as follows: "I now desire to call your attention to the main bout. In this corner, the American Beauty—Eleanor Roosevelt. In the other corner, that daring gladiator—Westbrook Pegler. Both contenders are undefeated. The referee will be Asa Lipshitz, alias Walter Winchell, the gregarious gendarme of the gents room."

The witness Thomas Burgman is the son of the defendant and lived with him continuously during the times mentioned in the indictment and can testify to a multitude of other peculiar, eccentric and erratic acts on the part of the defendant, such acts not being the acts of a normal human being.

Defendant desires to point out that certain records in Germany will reveal that at one period of time between 1940 and 1944 the defendant was incarcerated in a mental hospital, and defendant has been unable to obtain records with respect to this up to the present time. He asks that he be given permission to take whatever depositions are necessary in Germany that will throw light on his mental condition. Defendant says unto the Court that he is now of sound mind and suffers from no mental infirmity, 2028 but says that at the time of his broadcasts or at the time of the acts alleged to have been committed, he was of unsound mind and therefore was not responsible for these acts. It follows therefore that it would be important in the interest of justice that all information possible be obtained on this subject for the benefit of the Court and the jury.

Defendant says further that the witnesses are necessary and material and that he cannot safely go to trial without them, and he says further that he does not have sufficient means and is actually unable to pay the fees of such witnesses.

Defendant asks therefore that the witnesses be brought to the United States for use at his trial and that they arrive in advance of the trial in order that his counsel may confer with them, and that they remain in the United States until after the trial is concluded, and that all expenses in connection with the production of these witnesses in the District of Columbia from their place of residence in Germany till their return to their place of residence be paid by the United States in the same manner that fees and expenses are paid witnesses brought here as Government witnesses.

Defendant asks further that the witnesses referred to in this motion, as well as any other witnesses brought here at the request of the defendant, be protected while in Germany, during their journey to this country, during the time they are in this country, and during the time of their return to Germany, and that they not be molested, intimidated or harassed.

Defendant says unto the Court that if, after consideration, it is not possible to bring these witnesses
 2029 to the District of Columbia, that this Court authorize and direct the taking of their depositions in accordance with Rule 15C, Rules of Criminal Procedure, and all expenses incident thereto, including all expenses incurred by his counsel, be paid for by the United States Government.

HERBERT JOHN BURGMAN

By JAMES J. LAUGHLIN

Subscribed and sworn to before me this 30th day of June, 1949.

HARRY M. HULL,
Clerk
United States District Court
for the District of Columbia

By MARGARET L. BOWELL
Deputy Clerk

JAMES J. LAUGHLIN,
National Press Building
Counsel for Defendant

WILLIAM E. OWEN,
National Press Building
Counsel for Defendant

I certify that I have this day delivered copy of this amended motion to A. B. Caldwell, Esq., Criminal Division, Department of Justice; and to Miss Dorothy Fillius, Criminal Division, Department of Justice.

JAMES J. LAUGHLIN

This the 30th day of June 1949.

(Stamp) Filed June 30, 1949, Harry M. Hull, Clerk

2030

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

Charge: Vio. Sec. 1, Title 18; United States Code

UNITED STATES

VS.

HERBERT J. BURGMAN, *Defendant.*

On this 30th day of June, 1949, came the attorney of the United States; the defendant in proper person and by his attorney, James J. Laughlin, Esquire; whereupon the defendant's Motion for Production of Defense Witnesses, or in the alternative, for Authorization to Take a Deposition

coming on to be heard, after argument by counsel, the said motion is by the Court granted in part and denied in part. The defendant is remanded to the District jail.

By direction of
 ALEXANDER HOLTZOFF,
Presiding Judge
 Criminal Court #6
 HARRY M. HULL, *Clerk*
 By IRENE B. BURBOUGHS
Deputy

Present:

United States Attorney

By ARTHUR B. CALDWELL

DOROTHY FILLIUS,

Assistant United States Attorneys

F. ATTIG

Official Reporter

(Stamp) Filed July 1, 1949, Harry M. Hull, Clerk

2031

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA,

v.

HERBERT JOHN BURGMAN.

**Report of the Mental Condition of Herbert John Burgman
 By the Commission on Mental Health.**

The Commission on Mental Health, having complied with the order of the Court, entered in the above-entitled cause,

May 9, 1949, requesting examination of the mental condition of *Herbert John Burgman*, reports its findings to be, that:

Herbert John Burgman is of sound mind.

The Commission on Mental Health made an examination of the mental condition of Herbert John Burgman on June 2, 1949, at or about the hour of noon, in the District Jail.

The Physician-Members of the Commission on Mental Health examined the subject individually and separately on June 4th, June 6th, June 16th and June 18, 1949. A neurological examination was made on June 16, 1949 and psychological tests were made intermittently between these dates by the Clinical Psychologist of Gallinger Municipal Hospital.

Herbert John Burgman was interrogated regarding his family history and background, and was apparently willing to be examined, and was pleasant and in normal contact with his environment. At the first examination with the entire Commission, he manifested some apprehension as to whether or not the Commission on Mental Health intended to elicit information to be turned over to the F.B.I., and when assured that such was not their intention, but wished merely to make a neurological and psychiatric examination, he appeared relaxed, became pleasant and agreeable and talked freely for the remainder of the examinations.

2032 Herbert John Burgman relates the following facts which might appear to be pertinent in the understanding of his behavior.

He states:

(a) In 1932, while employed in the Embassy in Berlin, when suddenly informed of his mother's death, he became ill and suffered what he calls a nervous breakdown, which lasted for several weeks. He states, "I cried and cried and could not get over it"—indeed, he cried bitterly during the examination and begged that the Commission talk of other matters for this subject (his mother) was very painful to him even now.

(b) He alleges that in 1935, he suffered another breakdown. In retrospect he blames this breakdown

on the confusion in Germany caused by the growth of "Hitlerism". He states, "this made a tremendous impact on the people and on me."

(c) He alleges that in 1938 he suffered another breakdown, but is unable to give any specific or pertinent facts about this illness.

(d) He states that he was constantly under medical attention and given the liberal use of sedation to allay his nervous symptoms, during the war, altho, the symptoms in nowise prevented him from broadcasting.

(e) He relates the most important event in his psychiatric history to be his transfer from an Army prison to Army Station Hospital No. 317, in 1946. He states he was released from the hospital and began work for the Allied Military Government. Shortly thereafter, and early in the year 1947, his mental symptoms disappeared entirely, following a fall on the street, and states he "came to by myself and immediately began to feel better". He states that by March 1947, he had obtained a position with the Military Police as a guide and feels that the lack of responsibility was helpful to his continued progress to health.

He makes the clear statement that he now feels entirely normal; that he understands entirely the nature of the charges against him; the reasons for the examination, and the intention of the Court to proceed against him. Further, he states that, he feels competent to discuss his case with an attorney, stand trial and arrange for his own defense.

The symptoms described above are typical of those found in an anxiety reaction and not of a psychosis.

2033 *Physical and Neurological Examination:*

The physical examination revealed a rather pale looking, but well developed, middle-aged man, 5 feet 9 inches tall, weighing approximately 154 pounds, partly bald and dressed in prison garb.

The neurological examination was negative. The only abnormal physical findings were several absent teeth; a symmetrically enlarged prostrate, and dermatomycosis ("athletes foot") of both feet. There were two identifying scars on the abdomen; a well-healed scar in the lower left quadrant, measuring 6 to 7 centimeters in length with

depression in the upper aspect, from an old drainage wound; a 9 centimeter linear scar in the lower right quadrant with indentations in the center at the site of an old drainage wound.

The patient had complained that he had previously had heart disease. Nevertheless, our examination revealed the heart was within normal size and configuration; the apical impulse was at the 5th interspace, inside the mid-cavicular line; pulse rate 72; sound of good quality; rhythm regular; no murmurs; blood pressure 150/88; no evidence of retinal sclerosis.

Rorschach Diagnostic Study (Hartford Retreat Tests):

Revealed: That his personality was basically introverted; that he was above the average in intelligence and inclined to be speculative, and not too aware of the everyday problems of living.

Commission on Mental Health:

MARSHALL DE G RUFFIN, M. D.

ANNA COYNE TODD, M. D.

THOMAS GILLESPIE WALSH,

Lawyer-Member and Chairman

(Stamp) Filed July 20, 1949, Harry M. Hull, Clerk

2034

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

VS.

HERBERT JOHN BURGMAN, *Defendant.*

Motion for Reconsideration.

Now comes the defendant through his counsel and moves the Court for reconsideration of its ruling of June 30 with reference to order for authorization to take depositions.

As a result of the court's ruling, the Department of Justice is arranging for the appearance of Thomas Burgman as a defense witness, and has also set the machinery in motion to take the depositions of the following:

Emil W. K. Beckman, Schlewecke (Motte), Kreis Gandersheim, Germany (British Zone)

R. J. Boehringer, 16 Klueterstrasse, (21a) Detmold, Germany

Dr. Grage, City Hospital, Chemnitz, Germany.

Defendant says unto the Court that inasmuch as the depositions of Boehringer, Beckman and Dr. Grage will be taken, it will be in the interest of justice to also take the depositions of Franz Schafer, Erwin Christiani, Rudolf Kranz, Mrs. Paula Sexauer. The motions on file in this court will, in the opinion of defendant, show the materiality of their testimony. The witnesses can also testify as to

the circumstances under which defendant made his 2035 broadcasts and that he was doing so as a result of fear, threats and intimidation, and they can also testify that almost daily defendant was threatened with a concentration camp if he ceased broadcasting. Defendant desires to call the attention of this court to the press reports relating to the trial now in progress in San Francisco of Mrs. Iva Toguri d'Aquino, better known as "Tokyo Rose". If the press reports are true, the trial judge is permitting liberal latitude on cross-examination as to threats, coercion and intimidation. Defendant also says unto the court that the witnesses in this case can testify that defendant was mentally incapable during the time he was broadcasting in Germany.

It is believed that if the motion for reconsideration is granted to allow the taking of the depositions of the other persons named it will make for speed in the conduct of the trial.

JAMES J. LAUGHLIN
National Press Building
Counsel for Defendant

I certify that I have this day mailed copy of this motion to Miss Dorothy Fillius, Criminal Division, Department of Justice, Washington, D. C.

JAMES J. LAUGHLIN

This the 20th day of July, 1949.

(Stamp) Filed July 22, 1949, Harry M. Hull, Clerk

2036

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

Charge: Treason

UNITED STATES

VS.

HERBERT J. BURGMAN, *Defendant.*

On this 22nd day of July, 1949, came the attorney of the United States; the defendant in proper person and by his attorney, James J. Laughlin, Esquire; whereupon the defendant's Motion for production of defense witnesses or in the alternative order for authorization to take depositions, coming on to be heard, after argument by counsel, is by the Court granted.

By direction of

ALEXANDER HOLTZOFF

Presiding Judge

Criminal Court #1

HARRY M. HULL, *Clerk*

By EDWARD J. SKAZYNSKI

Deputy Clerk

Present:

United States Attorney

By DOROTHY FILLIUS

Assistant United States Attorney

RALPH MINIER

Official Reporter

(Stamp) Filed July 26, 1949, Harry M. Hull, Clerk
2037 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff*,

v.

HERBERT JOHN BURGMAN, *Defendant*.

**Order Granting Motion for Authorization to Take
Depositions.**

This cause having come on to be heard on the amended motion authorizing the taking of depositions, pursuant to Rule 15(c), Rules of Criminal Procedure, and same was argued by counsel, and upon consideration thereof, it is by the Court this 26th day of July, 1949

ORDERED that the motion be and the same is hereby granted, and it is

ORDERED that James J. Laughlin, counsel for defendant be and he is hereby authorized and directed to proceed to Germany for the taking of depositions of the following: R. J. Boehringer, Emil W. K. Beckman, Dr. Grage, Franz Schafer, Erwin Christiani, Rudolf Kranz and Mrs. Paula Sexauer, and it is further

ORDERED that all expenses in connection with same are to be paid by the United States pursuant to Rule 15(c), Rules of Criminal Procedure, in the same manner that fees and expenses are paid to Government counsel in the prosecution of said case.

BY THE COURT:

ALEXANDER HOLTZOFF,
United States District Judge.

Consented to:

FRED E. STRINE,

DOROTHY L. FILLIUS,

Counsel for the Government.

(Stamp) Filed Aug. 1, 1949, Harry M. Hull, Clerk
 2038 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA

v.

HERBERT JOHN BURGMAN.

Designation of Overt Acts.

Pursuant to the direction of this Court on July 22, 1949, the Government designates the following overt acts as the ones upon which it will rely at the trial of this case:

Overt Acts

10	19	32	47
11	20	35	54
12	27	36	55
14	28	43	56
16	29	46	60

FRED E. STRINE,
*Special Assistant to the Attorney
 General,*

DOROTHY L. FILLIUS,
*Attorney,
 Counsel for the Government.*

(Stamp) Filed Oct. 11, 1949, Harry M. Hull, Clerk
 2039 UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF COLUMBIA

Criminal No. 442-49
 Charge—Treason

UNITED STATES

v.

HERBERT J. BURGMAN, *Defendant.*

On this 11th day of October, 1949, came the attorney of the United States; the defendant in proper person and by his attorneys, James J. Laughlin, Esquire and William E. Owen, Esquire; whereupon jurors from Criminal Divisions Nos. One, Two and Three and Civil Division, being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

Julia A. Ribnitzki
 Homer R. Baker
 Catherine L. Owen
 William K. Younes
 Helen C. Canty
 Joseph Scheiner

George E. Sedgwick
 Thomas E. Mutchler, Sr.
 Virginia B. Daly
 Robert W. Draper
 Anna E. Gaum
 Richard T. Layton

who are sworn to well and truly try the issue joined herein.

It appearing to the Court that the trial is likely to be a protracted one, the Court directs the calling of Three additional persons to serve as alternate jurors and Sue Elena Schroth, Anne M. Wilkinson and Lucille B. Roe being called, are sworn to well and truly try the issue joined herein.

The case is respited until the meeting of the Court tomorrow morning.

By direction of
ALEXANDER HOLTZOFF,
Presiding Judge
Criminal Court #1.

HARRY M. HULL, *Clerk.*

By J. RUMSEY, *Deputy Clerk.*

Present:

United States Attorney

By WILLIAM A. PAISLEY, VICTOR C. WOERHEIDE,
DOROTHY FILLUIS, *Assistant United States Attorneys.*

LUCEDA H. POWELL, *Official Reporter.*

2053

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

v.

HERBERT JOHN BURGMAN, *Défendant.*

Defendant's Prayer No. Twelve.

The jury are instructed that an alien domiciled in a foreign country was bound to obey all the laws of that foreign country so long as he remained in it. All strangers are under the protection of a sovereign state while they are within its territory and they owe a local, temporary allegiance in return for the protection. The defendant, while domiciled in the German Reich owed a qualified allegiance to it. He was obligated to obey its laws and was equally

amenable to punishment with citizens of that country if he did not do so.

Denied, as irrelevant.

2060

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

v.

HERBERT JOHN BURGMAN, *Defendant.*

Defendant's Prayer No. Sixteen.

You have already been instructed that before the defendant can be convicted of the acts set forth in the indictment that it must be shown from the evidence that the defendant owed allegiance to the United States, and while you are instructed that a citizen of the United States can be expatriated only in accordance with the manner prescribed by the Congress, yet you are further instructed that if the defendant believed that through the action of our Government he had been expatriated, this would have a bearing on his intent to betray, and if you are satisfied from all the evidence in the case that the defendant was under the honest belief that he no longer owed allegiance to the United States then he could not be guilty of the acts of treason and you must acquit him.

Denied.

(Stamp) Filed Nov. 15, 1949, Harry M. Hull, Clerk

2062

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

v.

HERBERT JOHN BURGMAN, *Defendant.*

Special Findings by the Jury.

(Answer each question in writing, "Yes" or "No")

1. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 19, as a treasonable act with intent to betray the United States? A. Yes.

2. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 20, as a treasonable act with intent to betray the United States? A. Yes.

3. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 27, as a treasonable act with intent to betray the United States? A. Yes.

2063 4. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 29, as a treasonable act with intent to betray the United States? A. Yes.

5. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 32, as a treasonable act with intent to betray the United States? A. Yes.

6. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt

act No. 35, as a treasonable act with intent to betray the United States? A. Yes.

7. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 36, as a treasonable act with intent to betray the United States? A. Yes.

8. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 46, as a treasonable act with intent to betray the United States? A. Yes.

9. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 47, as a treasonable act with intent to betray the United States? A. Yes.

2064 10. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 54, as a treasonable act with intent to betray the United States? A. Yes.

11. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 55, as a treasonable act with intent to betray the United States? A. Yes.

12. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 56, as a treasonable act with intent to betray the United States? A. Yes.

13. Has it been established by the direct testimony of at least two witnesses that the defendant committed overt act No. 60, as a treasonable act with intent to betray the United States? A. Yes.

H. R. BAKER,
Foreman.

(Stamp) Filed Nov. 15, 1949, Harry M. Hull, Clerk
 2065 UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49
 Charge—Treason

UNITED STATES
 v.
 HERBERT J. BURGMAN, *Defendant.*

On this 15th day of November, 1949, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon the said jury after hearing further of the evidence and instructions of the Court, alternate jurors Sue E. Schroth, Anne M. Wilkinson and Lucille B. Rae, are discharged from further consideration in this case. The jury retires to consider their verdict. The jury returns into Court and upon their oath say that the defendant is guilty as indicted; whereupon each and every member of the jury is asked if that is his or her verdict and each and every member hereof say that the defendant is guilty of Treason.

The defendant is remanded to the District Jail.

By direction of
 ALEXANDER HOLTZOFF,
Presiding Judge,
Criminal Court #1.

HARRY M. HULL, *Clerk.*
 By C. J. RUMSEY, *Deputy Clerk.*

Present:

United States Attorney,

By VICTOR C. WOERHEIDE, DOROTHY FILLUIS,
Assistant United States Attorneys.

LUCEDA H. POWELL, *Official Reporter.*

(Stamp) Filed Nov. 18, 1949, Harry M. Hull, Clerk
2066 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

v.

HERBERT JOHN BURGMAN, *Defendant.*

Motion for New Trial.

Now comes the defendant, through his counsel, and moves the Court for an order vacating and setting aside the verdict of the jury and awarding a new trial. The following are the grounds:

1. The verdict was contrary to the evidence.
2. The verdict was contrary to the weight of the evidence.
3. The Court erred in admitting evidence offered by the prosecution.
4. The Court erred in excluding evidence offered on behalf of the defendant.
5. The Court erred in denying prayers tendered by the defendant.
6. The Court erred in refusing to further clarify the state of the evidence in its charge to the jury when so requested by the defense.
7. The Court erred in refusing to grant the motion to exclude Government employees from the jury panel.
8. The Court erred in refusing to suppress the recordings.
9. The Court erred in receiving evidence of recordings or broadcasts alleged to have been made by the defendant.
- 2067 10. The Court erred in admitting evidence of recordings of broadcasts alleged to have been made

by the defendant before sufficient basis was established for their admission.

11. The Court erred in refusing to instruct the jury that if the defendant believed he had been actually expatriated, that would go to the intent necessary in an offense of treason.

JAMES J. LAUGHLIN,
National Press Building,
Counsel for Defendant.

I certify that I have this day mailed copy of this motion to Victor C. Woehreide, Esq., Department of Justice, Washington, D. C.

JAMES J. LAUGHLIN,

This the 17th day of November, 1949.

(Stamp) Filed Dec. 15, 1949, Harry M. Hull, Clerk

2068

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff,*

v.

HERBERT JOHN BURGMAN, alias JOE SCANLON, *Defendant.*

Opinion.

William A. Paisley, Esq., and Victor C. Woerheide, Esq., both of Washington, D. C., for the United States.

James J. Laughlin, Esq., and William W. Owen, Esq., both of Washington, D. C. for the defendant.

The defendant has been convicted of treason and moves for a new trial.

On December 11, 1941, when war was declared between the United States and Germany, the defendant was a member of the staff of the American Embassy in Berlin. The entire personnel, with the exception of the defendant, immediately left the German capital and was interned. The defendant voluntarily stayed behind. In February, 1942, he accepted employment from the German Broadcasting Company, which was controlled by the German Government. A clandestine shortwave radio station was established by the company in Berlin, for the purpose of broadcasting propaganda to the United States. The station was given the name "Station Debunk," and purported to operate somewhere in the Middle West. The defendant was employed as commentator and speaker on these broadcasts. He prepared the manuscripts containing pro-German propaganda, and made recordings of this material, which was broadcast to the United States by means of short wave radio. The aim of the broadcasts was to sow discontent with the Government of the United States, to impair the morale of the armed forces, and to create dissension between the American people and the people of the allied countries. Many of the broadcasts were caught by a United States Government monitoring station maintained at Silver Hill, Maryland.

The jury found the defendant guilty and also answered affirmatively special interrogatories to the effect that the Government established thirteen overt acts of treason as having been committed by the defendant. Each overt act consisted of making a specific recording.

There have been comparatively few trials for treason in the history of the United States. Not a single execution for treason has occurred in this country since the adoption of the Constitution. In England, for several centuries preceding the Revolution of 1688, treason trials were common and frequently took place when one faction took the control of the Government away from another. The definition of treason was carried on an extreme. *Howell's State*

Trials are replete with reports of these cases. On the other hand, the annals of American jurisprudence

ence disclose a wholesome freedom from charges of treason based on considerations of politics or vindictiveness. In part this salutary result is to be ascribed to the moderation and self-restraint of our people. In part it is to be attributed to the keen foresight and profound wisdom of the Founding Fathers. The Constitution of the United States explicitly defines the crime of treason. Nothing that fails to fit within the framework of this definition may be regarded as treason. Article III, Section 3, paragraph 1, of the Constitution provides as follows:

“Treason against the United States, Shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

Congress has enacted the following statute defining treason (18 U. S. Code 2381):

“Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than \$10,000; and shall be incapable of holding any office under the United States.”

Thus, there are only two types of treason against the United States: first, levying war against the United States; and second, adhering to their enemies, giving them aid and comfort.

As the reported treason cases are comparatively few, it may be useful to review them briefly in chronological order.

2071 The first prosecutions of this type arose out of the Whiskey Rebellion. Some of the leading rebels were charged with levying war against the United States in connection with their attempts to resist the enforcement of the internal revenue laws.¹ A rather curious prosecution

¹ *United States v. Vigol* (1795) 28 Fed. Cas. No. 16621; *United States v. Mitchell* (1795) 26 Fed. Cas. No. 15788.

for treason, which did not result in conviction, took place several years later in connection with an insurrection in Pennsylvania against the enforcement of an Act of Congress providing for numbering and measuring windows as a basis for taxation.²

The most famous and spectacular treason case in the history of the United States, dealt with the *Burr* conspiracy. It was tried before Chief Justice Marshall, sitting at circuit. Aaron Burr was charged with levying war against the United States, in that he conspired with others to detach from the United States a part of the territory bordering on the Mississippi River, and to establish an independent dominion. The trial ended in a verdict of not guilty.³

Another prosecution for treason took place in 1808 in the District of Vermont. The defendant was accused of levying war against the United States in connection with some activities intended to oppose the enforcement of the Embargo Act. It was held that these actions did not constitute treason, as they were carried on for a private object, rather than for the purpose of subverting the Government.⁴

2072 Several prosecutions for treason were instituted during the war of 1812. In one case the defendant was indicted for adhering to the enemies of the United States by supplying them with food, showing them the channels of the Potomac River and informing them of the location of troops of the United States.⁵ Another case involved the return of some British prisoners to the British commander.⁶ In still another case the defendant was charged with adhering to the enemy in that he went ashore from a British ship on which he had been held as a prisoner. The accusation was that his purpose was to unite with the enemy in acts of hostility.⁷

² *United States v. Fries* (1799) 9 Fed. Cas. No. 5126.

³ *United States v. Burr* (1807) 25 Fed. Cas. No. 14693; see also *Ex parte Bollman* and *Ex parte Swartwout* (1807) 4 Cranch 75, 126.

⁴ *United States v. Hoxie* (1808) 26 Fed. Cas. No. 15407.

⁵ *United States v. Lee* (1814) 26 Fed. Cas. No. 15584.

⁶ *United States v. Hodges* (1815) 26 Fed. Cas. No. 15374.

⁷ *United States v. Pryor* (1814) 27 Fed. Cas. No. 16096.

An endeavor to prosecute as treason the participation in a riot to resist the enforcement of the Fugitive Slave law, met with failure.⁸

It is greatly to the credit of the American people that the Civil War did not give rise to numerous charges of treason. An attempt to prosecute Jefferson Davis ended after long delays with a dismissal of the indictment on a technicality.⁹ One person was accused of treason in that he fitted out a schooner for privateering purposes.¹⁰ There appear to be no reported cases of treason arising out of the Civil War.

2073 World War I gave rise to only a couple of treason cases. They involved the harboring of hostile spies and conveying information to the enemy.¹¹ In the light of the far-reaching ramifications of World War II and the unprecedented magnitude of the armed forces of the various belligerents, it is not surprising that a number of treason prosecutions were among the consequences of this stupendous global conflict. In one case the defendant was convicted of treason consisting of harboring and assisting an escaped German prisoner of war.¹² In two cases, the defendants were charged with aiding and sheltering German saboteurs, who were landed on American soil from German submarines.¹³ Several cases, one of which has reached the appellate courts, involved persons who had acted as radio commentators in enemy countries in time of war and in that capacity prepared anti-American propaganda material for broadcasting by radio.¹⁴ A similar case arose in England.¹⁵ The case at bar falls in this group.

The principal point advanced by the defendant is that the preparation and making of speeches does not,

⁸ *United States v. Hanway* (1851) 26 Fed. Cas. No. 15299.

⁹ *Case of Jefferson Davis*, 7 Fed. Cas. No. 3621-A.

¹⁰ *United States v. Greathouse* (1863) 26 Fed. Cas. 15254.

¹¹ *United States v. Frieke* (1919) 259 Fed. 673; *United States v. Robinson* (1919) 259 Fed. 685.

¹² *United States v. Stephan* (C.C.A. 6th) 133 F. (2d) 87, cert. den. 318 U. S. 781.

¹³ *Cramer v. United States* (1945) 325 U. S. 1; *Haupt v. United States* (1946) 330 U. S. 631.

¹⁴ *Chandler v. United States* (1948) 171 F. (2d) 921.

¹⁵ *Joyce v. Director of Public Prosecution* (1946) Appeal Cases 347.

2074 in itself, constitute treason. It is presumably contended that the defendant was exercising his right of freedom of speech guaranteed by the First Amendment. This position is not tenable. The right of freedom of speech is not unqualified or absolute.

Actions may assume the form of oral pronouncements. The utterance of words frequently constitute a crime. For example, to advocate the overthrow of the government by force and violence, to urge some one to commit a crime, to disseminate obscene literature, to foment a riot, are all criminal offenses, even if they are committed merely by verbal statements. Words uttered with intent to betray one's country may well constitute treason. For instance, to deliver valuable secret information to the enemy by word of mouth is treason. It is a fallacy to contend that to constitute treason there must be some act other than the utterance of words. To traffic with the enemy and to accept employment from the enemy for the purpose of preparing speeches to be used in a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully, is treasonable conduct. It is not protected by the First Amendment. Acting as a radio commentator, as the defendant did in this case, for the purpose of spreading and disseminating pro-enemy propaganda, constitutes treason.

The same point was raised in the First Circuit in *Chandler v. United States*, 171 F. (2d) 921, 938-940, and was overruled in an able and scholarly opinion written by Judge Magruder.

It is further urged in behalf of the defendant that the admission in evidence of recordings made by him, and
 2075 playing them at the trial, was a violation of the right against self-incrimination under the Fifth Amendment. This contention seems to involve a misconception of the privilege. The Fifth Amendment safeguards the right of every defendant not to be required to testify against himself. This doctrine is basic and fundamental in Anglo-American jurisprudence. It does not, however, bar proof of words spoken by the defendant. It is on this

principle that statements and confessions made by defendants are admissible in evidence. If a stenographer recorded the defendant's oral statements, the stenographer would be a competent witness to testify to their contents. Modern technical developments, however, have made it possible to record statements by mechanical and electrical devices and later to reproduce the speaker's words in his own voice. Recordings of this type are equally admissible in evidence, and their introduction does not transcend the limitations of the Fifth Amendment.

The defendant finally raises an objection as to venue. The pertinent statute provides that the trial of all offenses committed out of the jurisdiction of any particular State or district, shall be in the district where the offender is found or into which he is first brought (18 U. S. C. 3238). In this case the defendant was brought from Germany to the United States by airplane and landed first in the District of Columbia. Under these circumstances, the District of Columbia is the district into which the accused was first brought, *Chandler v. United States, supra*, p. 93. Consequently, this court has jurisdiction and venue is properly laid in this district.

Motion for a new trial is denied.

ALEXANDER HOLTZOFF,
United States District Judge.

December 15, 1949.

(Stamp) Filed Dec. 16, 1949, Harry M. Hull, Clerk.

2076

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Criminal No. 442-49

Charge: Treason

UNITED STATES

VS.

HERBERT J. BURGMAN, *Defendant.*

On this 15th day of December, 1949, the defendant's motion for a new trial, heretofore argued and submitted, is by the Court denied.

By direction of

ALEXANDER HOLTZOFF,
Presiding Judge
Criminal Court # 1

HARRY M. HULL, *Clerk*

By C. J. RUMSEY,
Deputy Clerk.

Present:

United States Attorney

By None Present

Assistant United States Attorney

LUCEDA H. POWELL,

Official Reporter.

(Stamp) Filed Dec. 21, 1949, Harry M. Hull, Clerk
2077 **Judgment and Commitment**

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA DIVISION

Criminal No. 442-49

UNITED STATES OF AMERICA

v.

HERBERT JOHN BURGMAN, otherwise known as, JOE SCANLON.

On this 20th day of December, 1949, came the attorney for the government and the defendant appeared in person and by counsel, James J. Laughlin, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of TREASON as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) Years to Twenty (20) Years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

ALEXANDER HOLTZOFF,
United States District Judge.

The Court recommends commitment to Lewisburg,
Penna.

.....,
Clerk.

(Stamp) Filed Dec. 20, 1949, Harry M. Hull, Clerk.

2078 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA, *Plaintiff*,
VS.
HERBERT JOHN BURGMAN, *Defendant*.

Notice of Appeal.

Name and address of appellant: Herbert John Burgman,
Washington Asylum & Jail, 200 19th St., S. E.

Name and address of appellant's attorney: James J.
Laughlin, National Press Building.

Offense: Treason.

Date of Judgment: December 20, 1949.

Brief description of judgment:

Appellant hereby appeals to the United States Court of
Appeals for the District of Columbia.

JAMES J. LAUGHLIN,
National Press Building,
Counsel for Appellant.

Let this appeal be filed without prepayment of cost.

ALEXANDER HOLTZOFF,
United States District Judge.

I certify that I have this day mailed copy of this notice to Victor C. Woerheide, Esq., Department of Justice, Washington, D. C.

JAMES J. LAUGHLIN,

This the 20 day of December, 1949.

(Stamp) Filed Dec. 20, 1949, Harry M. Hull, Clerk.

2079

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49.

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

HERBERT JOHN BURGMAN, *Defendant.*

Order Designating Stenographic Transcript as Record on Appeal

Upon application of the defendant, it is by the Court this 20 day of December, 1949

ORDERED that the complete stenographic transcript in the above entitled cause, pages 1 to —, be designated as the record on appeal in the above entitled cause and the same transmitted to the United States Court of Appeals for the District of Columbia Circuit.

By the Court:

ALEXANDER HOLTZOFF,
United States District Judge.

Agreed to on behalf of the Government.

VICTOR C. WOERHEIDE,
Special Assistant to the Attorney General.

(Stamp) Filed Dec. 28, 1949, Harry M. Hull, Clerk.

2080 IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES, *Plaintiff,*

VS.

HERBERT JOHN BURGMAN, *Defendant.*

Designation of Record

The Clerk will please prepare the record in the above entitled cause and include therein the following:

1. Indictment.
2. Minute entry of plea.
3. Motion to subpoena defense witnesses at the expense of the United States.
4. Motion to suppress records.
5. Motion to exclude Government employees from jury duty.
6. Motion to dismiss.
7. Affidavit in forma pauperis.
8. Minute entry of verdict.
9. Minute entry of special findings of the jury.
10. Motion for new trial.
11. Memorandum opinion denying motion for new trial.
12. Judgment.
13. Notice of appeal.
14. Order designating stenographic transcript as record on appeal.
- 2081 15. This designation of record.
16. Clerk's certificate.

JAMES J. LAUGHLIN,
National Press Building,
Counsel for Defendant.

I certify that I have this day mailed copy of this designation of record to Miss Dorothy Fillius, Criminal Division, Department of Justice, Washington, D. C.

JAMES J. LAUGHLIN.

This the 28th day of December, 1949.

(Stamp) Filed Jan. 5, 1950, Harry M. Hull, Clerk.

2082 IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA,

v.

HERBERT JOHN BURGMAN.

**Stipulation Extending Time for Filing Counter-Designation
of Contents of Record on Appeal.**

It is hereby stipulated between the parties to the above-entitled action by and through their respective attorneys of record that the United States may have up to and including 17 January 1950 in which to serve and file its counter-designation of contents of record on appeal herein.

Dated at Washington, D. C., this 5th day of January, 1950.

VICTOR C. WOERHEIDE,
*Special Assistant to the
Attorney General.*

DOROTHY L. FILLIUS,
*Special Attorney
Department of Justice.
Attorneys for the United States.*

JOHN J. LAUGHLIN,
Attorney for Defendant.

(Stamp) Filed Jan. 5, 1950, Harry M. Hull, Clerk.

2083 IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA,

v.

HERBERT JOHN BURGMAN.

**Order Extending Time for Filing Counter-Designation of
Contents of Record on Appeal.**

This matter having come duly and regularly before the above-entitled court, and it appearing that both parties hereto by and through their respective counsel of record have stipulated that the United States, may have up to and including January 17, 1950 in which to serve and file its counter-designation of contents of record on appeal herein, and the court being duly advised in the premises,

Now, THEREFORE, It IS HEREBY ORDERED AND ADJUDGED that the United States may have up to and including 17 January 1950 within which to file its counter-designation of contents of record on appeal herein.

Done in open court this 5 day of January 1950.

ALEXANDER HOLTZOFF,
United States District Judge.

(Stamp) Filed Jan. 17, 1950, Harry M. Hull, Clerk
2084 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA
v.
HERBERT JOHN BURGMAN

Counter-Designation of Contents of Record on Appeal.

Comes now the United States of American herein and files this, its counter-designation of the following portions of the Record, proceedings, and evidence to be contained in the Record on Appeal, under the Federal Rules of Civil and Criminal Procedure:

1. Order of Judge Schweinhaut, filed April 29, 1949, denying defendant's motion for defense witnesses at the expense of the Government.

2. Order of Judge Schweinhaut, filed April 29, 1949, denying defendant's motion to suppress recordings.

3. Order of Judge Schweinhaut, filed April 29, 1949, denying defendant's motion for exclusion of Government employees from the jury list.

4. Order of Judge Schweinhaut, filed April 29, 1949, denying defendant's motion to dismiss.

5. Order of Judge Schweinhaut, filed May 9, 1949, directing that the Commission on Mental Health for the District of Columbia examine the defendant and conduct an investigation to determine his mental condition.

6. Report by Commission on Mental Health for the District of Columbia on the defendant's mental condition, filed July 1, 1949.

7. Defendant's motion for the production of defense witnesses, or in the alternative, for authorization to take depositions, filed June 17, 1949.

8. Defendant's amended motion for the production of defense witnesses, or in the alternative, order for authorization to take depositions, filed June 30, 1949.

2085 9. Order by Judge Holtzoff, filed June 30, 1949, granting in part and denying in part defendant's motion for production of defense witnesses, or in the alternative, for authorization to take depositions.

10. Defendant's motion for reconsideration, filed July 20, 1949.

11. Order by Judge Holtzoff, filed July 22, 1949, granting defendant's motion for production of defense witnesses, or in the alternative, order for authorization to take depositions.

12. Order by Judge Holtzoff, filed July 26, 1949, granting motion for authorization to take depositions abroad.

13. Designation of overt acts, filed August 1, 1949.

14. Stenographic transcript of the trial, pages 1 to 2046 inclusive.

15. Government Exhibits No. 6 to 6e inclusive, 7 to 7e inclusive, 8 to 8g inclusive, 10 to 10i inclusive, 11 to 11h inclusive, 12 to 12g inclusive, 13 to 13g inclusive, 15 to 15i inclusive, 16a to 16d inclusive, 17 to 17g inclusive, 18 to 18f inclusive, 19 to 19f inclusive, 20 to 20h inclusive, 21, 22, 23, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 36a, 37, 37a, 41, 42, 43, 44, 45, 46, 57, 58, 59 and 60, and Defendant's Exhibits Nos. 3, 6 and 7.

16. Defendant's Prayers Nos. 1 to 17, inclusive.

17. Stipulation extending time for filing counter-designation of contents of Record on Appeal.

18. Order extending time for filing counter-designation of Record on Appeal.

19. This counter-designation of contents of Record on Appeal.

VICTOR C. WOERHEIDE,
*Special Assistant to the
Attorney General,*

DOROTHY L. FILLIUS,
*Special Attorney,
Attorneys for the United States.*

2086 I certify that I have this the 16th day of January, 1950, mailed a copy of this counter-designation of record to James J. Laughlin, Esquire, Counsel for Defendant, National Press Building, Washington, D. C.

VICTOR C. WOERHEIDE,
*Special Assistant to the
Attorney General.*

(Stamp) Filed Jan. 17, 1950, Harry M. Hull, Clerk.

2087 IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA,

v.

HERBERT JOHN BURGMAN.

**Stipulation for Filing Exhibits as a Part of the Record and
Their Transmission to the Court of Appeals as a Part
of the Record on Appeal.**

It is hereby stipulated between the parties to the above-entitled action by and through their respective attorneys of record that Government Exhibits Nos. 6 to 6e inclusive, 7 to 7e inclusive, 8 to 8g inclusive, 10 to 10i inclusive, 11 to 11h inclusive, 12 to 12g inclusive, 13 to 13g inclusive, 15 to 15i inclusive, 16a to 16d inclusive, 17 to 17g inclusive, 18 to 18f inclusive, 19 to 19f inclusive, 20 to 20h inclusive, 21, 22 23, 25 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 36a, 37, 37a, 41, 42, 43, 44, 45, 46, 57, 58, 59, and 60, and Defendant's Exhibits Nos. 3, 6 and 7, be filed as a part of the record herein and that said exhibits be transmitted by the clerk to the Court of Appeals as part of the record on appeal.

Dated at Washington, D. C., this 17th day of January, 1950.

VICTOR C. WOERHEIDE,
*Special Assistant to the
Attorney General.*

DOROTHY L. FILLIUS,
Special Attorney.
Attorneys for the United States.

JAMES J. LAUGHLIN,
Attorney for Defendant.

(Stamp) Filed Jan. 17, 1950, Harry M. Hull, Clerk.

2089 IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA,

v.

HERBERT JOHN BURGMAN.

**Order for Filing Exhibits as a Part of the Record and Their
Transmission by the Clerk to the Court of Appeals as
Part of the Record on Appeal.**

This matter having come duly and regularly before the Court, and it appearing that both parties hereto by and through their respective counsel of record, have stipulated that Government Exhibits Nos. 6 to 6e inclusive, 7 to 7e inclusive, 8 to 8g inclusive, 10 to 10i inclusive, 11 to 11h inclusive, 12 to 12g inclusive, 13 to 13g inclusive, 15 to 15i inclusive, 16a to 16d inclusive, 17 to 17g inclusive, 18 to 18f inclusive, 19 to 19f inclusive, 20 to 20h inclusive, 21, 22, 23, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 36a, 37, 37a, 41,

42, 43, 44, 45, 46, 57, 58, 59 and 60, and Defendant's Exhibits Nos. 3, 6 and 7, be filed as part of the record herein and that said exhibits be transmitted by the clerk to the Court of Appeals as part of the record on appeal, it is this 17th day of January 1950

ORDERED that said exhibits be filed by the clerk as part of the record in this proceeding and that the clerk transmit said exhibits to the United States Court of Appeals as part of the record on appeal.

ALEXANDER HOLTZOFF,
United States District Judge.

(Stamp) Filed Jan. 17, 1950, Harry M. Hull, Clerk
2088 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 442-49

UNITED STATES OF AMERICA

v.

HERBERT JOHN BURGMAN

Supplementary Counter-Designation of Contents of Record on Appeal.

Comes now the United States of America herein and files this, its supplementary counter-designation of the following portions of the Record, proceedings, and evidence to be contained in the Record on Appeal, under the Federal Rules of Civil and Criminal Procedure:

1. Order of Judge Holtzoff, filed January 17, 1950, for filing exhibits as part of the Record and their transmission by the clerk to the Court of Appeals as part of the Record on appeal.

2. This supplementary counter-designation of contents of Record on Appeal.

VICTOR C. WOERHEIDE,
*Special Assistant to the
Attorney General.*

DOROTHY L. FILLIUS,
Special Attorney.
Attorneys for the United States.

I certify that I have this the 17th day of January, 1950, mailed a copy of this supplementary counter-designation of record to James J. Laughlin, Esquire, Counsel for Defendant, National Press Building, Washington, D. C.

VICTOR C. WOERHEIDE,
*Special Assistant to the
Attorney General.*

Gov't Ext. No. 36a

(Stamp) Filed Feb. 23, 1949, Harry M. Hull, Clerk

CONTRACT

Between the
German Broadcasting Company, Masurenalle, Berlin-
Charlottenburg

and

Mr. / Mrs. (stricken out) / Miss (stricken out) Dr. Herbert
Burgman the following contract is concluded:

1

Dr. Burgman shall be employed as Language editor/
U.S.A. News Room. As a result of the war, i.e., because of
the draft into military service of permanent employes and/
or the additional operations of the broadcasting company
during wartime, his employment shall be of a temporary
nature.

2

Dr. Burgman shall receive for this work a gross salary of 1,500—one thousand five hundred Reichsmark a month.

3

Dr. Burgman shall receive children's bonus (last two words stricken out), special bonus, and leave on the same basis as that applying to the permanent employes of the German Broadcasting Company. However, an employee who has completed less than four full months service with the German Broadcasting Company by December 31, 1942 shall not receive any pro-rated special bonus. Dr. Burgman shall have none of the additional rights of the permanent employes. Verbal agreements shall be void.

4

The contract shall become effective on May 1, 1942 and shall be for an indefinite period. It may be terminated by either party without stating reasons, subject to one month advance notice. The German Broadcasting Company shall have the right to terminate the contract for an important reason, if Dr. Burgman's job is abolished (as, for instance, in case of a reduction or discontinuance of transmissions). In this case one week advance notice shall be given.

Berlin—Charlottenberg, June 19, 1942

German Broadcasting Company

By order: Wagner

By order: Weber

HERBERT BURGMAN.

(signature of employee)

